IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 733

PAUL DE LUCIA

vs.

WILBOR T. FLAGG

PETITION

For a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

WM. SCOTT STEWART
Chicago, Illinois
Counsel for Petitioner

Appended

Opinion of Court of Appeals, Opinion of District Judge and Opinions in related cases.

McCORMICK & HENDERSON INC., CHICAGO, ILL.

SUBJECT INDEX

	PAGE
The opinions of the courts below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	7
Statutes Involved	7
Summary Statement of Matter Involved	8
Summary of Argument	30
Argument	63
Prayer for Writ	205
Appendix	801

Index to Headings in Argument

	Page in Summary	Page in Argument
Conflict in Construction of the McCarran Act as to Status Acquired by Petitioner	30	63
Conflict as to Doctrine of Res Judicata	30	64
Conflict as to Jurisdiction in re Denaturalization	30	64
Conflict as to Passport Act	32	67
Conflict with a Decision of a District Court in Another Circuit	32	68
Reasons for Asserting that Lehmann v. Carson, 353 U.S. 685 does not control here	32	68
The need to explain, clarify or distinguish Lehmann v. Carson, 353 U.S. 685		75

	Page in Summary	Page in Argument
Petitioner having entered prior to July 1, 1924 cannot be deported for illegal entry.	34	79
Ex Post Facto.	35	81
The Savings Clause in the McCarran Act Requires Application of the 1917 Immigration Act to Petitioner and preserves his Status Thereunder.	36	82
History of the Savings Clause.	36	85
The Orders and Judgment entered by Judge Wilkerson in 1928 are res judicata on the very issues relitigated before the Administrative Tribunals.	37	86
What constitutes showing of good moral character on the part of an applicant for naturalization.		115
The Hearing Officer unlawfully placed the Burden upon Petitioner.	49	137
The Administrative Agency Acted on the Assumption that Section 291 of the McCarran Act Took from an Alien the Privilege against Self-Incrimination.	50	139
The Administrative Tribunal Failed to distinguish between a passport issued to petitioner and one issued to another and used by petitioner.	52	146
Please note the differences between the witness Maglio and the petitioner.	52	151
The Government Suppressed Important Evidence Within the Control of Its Officials.	55	165
The Hearing Officer considered matters not introduced in evidence, in the absence of proof.	56	171
Motion Pursuant to Rule 60(b).	62	198

Index to Appendix

	PAGE
Opinions:	
Judge LaBuy	801
Court of Appeals	
In Denaturalization	813
In Contempt Case	823
In Deportation Case	845
Judge Perry	827
Statutes re Deportation	852
Text Book re Naturalization	856
Savings Clause Compared	859
Text Book—Crime Moral Turpitude	861
Certificate of Arrival	863
Order Admitting Petitioner	863
Motion under Rule 60 (b)	865
Suggestions	865
Government Answer	868
Order of Court of Appeals	
Stay of Mandate	870
Exhibits and Briefs to this Court	870
Motion under Rule (b) denied	871

PAGE

History of Savings Clause 871

Broadest ever enacted 873

Existing Conditions Preserved 878

Rights in Process 878

Retroactive Provisions 880

Otherwise Specified 880

Re Section 405 881

Scheme re Savings Clause 882

Policy of Preservation 886

Effect to All Parts 886

Table of Cases

Aakervik ads States, 180 Fed. 137 99

Aberasturi v. Cain, 147 F. 2nd 449 64

Ablett v. Brownell, 240 F. 2nd 625, 631 59

Abraham v. Casey, 179 U.S. 210 ..... 90, 129

Aero Mayflower Transit Co. v. Carpentier, 167 F. Supp. 898 162

Angel v. Bullington, 330 U.S. 183 ..... 42, 100

Anselmo v. Hardin, 253 F. 2nd 165 ..... 30, 38, 42, 64, 72, 96, 100

Barber v. Hong, 254 F. 2nd 382 ..... 32, 69

Bennedsen v. Nelson, 2 F. 2nd 296, 298 ..... 34, 79

Barron, In re, 26 F. 2d 106 114

Benevenuto v. Barber, 157 F. Supp. 575, 578 204

Bertoldi v. McGrath, 178 F. 2nd 977 64

	PAGE
Bestpatow, in re, 140 F. Supp. 44	116
Bindczyk v. Finucane, 342 U.S. 76, 93	127
Bolter, in re, 66 F. Supp. 566	96
Bridges v. Wixon, 326 U.S. 135, 150	191
Briscoe v. Dist. of Colombia, 224 U.S. 547, 553	47, 123
Browne v. Zurbrick, 45 F. 2nd 931, 933	186
Brownell v. Tom We Shung, 352 U.S. 180	8
Butikofer, ads United States, 228 Fed. 918	168
Butler v. Denton, 150 F. 2nd 687, 690	124
Calvillo v. Robinson, 271 F. 2nd 249, 250	59, 110
Caprito v. United States, 217 F. 2nd 783	48
Carlisi ads United States, 32 F. Supp. 479, 482	132
Carollo ads United States, 30 F. Supp. page 7, p. 12 d.	180
Carson ads Lehmann, 353 U.S. 685	34
Casey ads People, 399 Ill. 274, 378	62
Cepo v. Brownell, 147 F. Supp. 517	94
Certain Parcels of Land ads United States, 131 F. Supp. 65	160
Chaunt v. United States, 364 U.S. 350	114
Chemical Foundation ads United States, 272 U.S. 1, 14	162
Chicot County Dist. v. Bank, 308 U.S. 371, 378	45, 113
Chung Shee ads United States, 76 Fed. 951, 956	106
Cities Service Co. v. Securities and Exchange Comm., 257 F. 2nd 926, 930	40, 47, 120
Comm's of Immigration ads United States, 36 F. 2nd 239	138

	PAGE
Commissioner v. Sunnen, 333 U.S. 591	199
C. M. St. Ry. v. Coogan, 271 U.S. 472, 477	194
Connal, 8 F. 2nd 374, 375	118
Continental Oil Co. v. Jones, 176 F. 2nd 519	95
Corsi v. Zaffarano ex rel ads United States, 63 F. 2nd 757, 759	32, 179, 188
Corsi ads United States, 57 F. 2nd 868	32, 67
Costello v. United States, 365 U.S. 265, 271	127, 204
Cromwell v. County of Sac, 94 U.S. 351	95
Cruz-Sanchez v. Robinson, 136 F. Supp. 53, 55 (S.D. Cal. 155)	95
Cufari v. United States, 120 F. Supp. 941, 217 F. 2nd 404	152
Curran ads United States, 298 F. 951	166
Curran ads United States, 15 F. 2nd 427	138
Davis v. McKinnon & Mooney, 266 F. 2nd 870, 872	131
Day ads United States, 51 F. 2nd 1022	179
Denny, in re, 47 F. Supp. 36	122
DeSollar v. Hanscombe, 158 U.S. 216, 227	130
Diaz v. Gonzalez, 261 U.S. 102, 105	179
District Director of Immigration ads United States, 106 F. 2nd 14	58
District Director ads United States, 106 F. 2nd 14, 19	174, 188
Dixie Sand and Gravel Corp. v. Holland, 255 F. 2nd 304, 310	129

	PAGE
Donald v. White, 68 F. 2nd 441	132
Dulles v. Katamoto, 256 F. 2nd 545	174
Dunton ads United States, 291 F. 905	190
Duran-Garcia v. Neely, 246 F. 2nd 287	110
Eberhardt ex parte, 270 Fed. 334, 335	93
Engel v. Zurbrick, 51 F. 2nd 632, 633	34, 79
Esnault-Belterie v. Chance Vought Corp., 56 F. 2nd 393, aff'd 66 F. 2nd 474	196
Fanariotis in re, 33 F. 2nd 313	116
Field, In re Petition, 159 F. Supp. 144	109
Fink v. Reimer, 96 F. 2nd 217	52, 155
Fong Haw Tan v. Phelan, 333 U.S. 10	205
Forbes v. Brownell, 149 F. Supp. 848	188
Gegiow v. Uhl, 239 U.S. 3	161
Ginsberg v. United States, 243 U.S. 472	48
Goldstein ads United States, 30 F. Supp. 771, 773	146
Gouthro ex parte, 296 Fed. 506, 511, aff'd 8 F. 2nd 1023	53, 147, 151
Grabina ads United States, 119 F. 2nd 863	167, 170
Grunewald v. United States, 353 U.S. 391	143
Guettel v. United States, 95 F. 2nd 229	132
Harisiades v. Shaughnessy, 342 U.S. 580, 597, 598	49, 138
Hauck ads United States, 135 F. 2nd 141	48
Hickey v. Johnson, 9 F. 2nd 498	132
Hoier v. Kaplan, 313 Ill. 448 N.E. 243	126

	PAGE
Herrera-Roca v. Barber, 150 F. Supp. 492	110
Italia v. Durning, 115 F. 2nd 711	157
Jackson v. Vance, 179 F. 2nd 154, 158	122
James v. United States, 366 U.S. 213	29, 90, 200
Johannessen v. United States, 225 U.S. 227	48, 133
Johnson v. United States, 256 F. 2nd 849	90, 113, 199
Jordan v. DeGeorge, 341 U.S. 223, 226	62, 182
Jow Gin in re, 175 F. 2nd 299	44
Kershner ads United States, 228 F. 2nd 142, 146	34, 75
Kithcart v. Metropolitan Life Ins. Co., 119 F. 2nd 497	90
Klig v. United States, 296 F. 2nd 343	114
Knauer v. United States, 328 U.S. 654, 670	48, 113
Kreticos ads U. S., 40 F. 2nd 1020	119
Kusche ads United States, 56 F. Supp. 201	127
Kwock Jan Fat v. White, 253 U.S. 454	174
Kwong Hai Chew v. Colding, 344 U.S. 590	143
Landon v. Clarke, 239 F. 2nd 631	110
Langheimer v. Hamilton, 295 F. 2nd 642	110
Lango, 21 F. 2nd 968	46, 117
Larsen v. Northland Trans. Co., 292 U.S. 20, 25	47, 96, 121
Lawler v. National Screen Service Corp., 349 U.S. 322, 326	95
Lehmann v. United States ex rel Carson, 353 U.S. 685, 690	34, 35, 82
Lehmann ads United States, 136 F. Supp. 458	35, 77, 80
Lehmann v. United States, 248 F. 2nd 519	34, 77

	PAGE
Lejbowitz in re, 49 F. Supp. 953	155
Lloyd v. Etting, 28 U.S. 329, 339	146
Luria v. United States, 231 U.S. 9	48
Maisenberg v. United States, 356 U.S. 670	200
Maney v. United States, 278 U.S. 17	48
Marcello v. Bonds, 349 U.S. 302, 319	82
Marino ads United States, 27 F. Supp. 155	110
McConney v. Rogers, 287 F. 2nd 473	174
McGrath ads Wong Yang Sung, 339 U.S. 33	199
McKay v. McAlexander, 268 F. 2nd 35, 39	203
Menasche ads United States, 348 U.S. 528, 535, 539	34, 36, 64, 73
Mercer Irr. District, in re, 25 F. Supp. 981, 987	122
Mercer v. Lenoe, 96 F. 2nd 122	187
Minnerich ads United States, 250 F. 2nd 721, 730	67, 114
Mongiori v. Karnuth, 30 F. 2nd 825	186
Moore ads People, 146 Ill. 600	59, 182
Morand Bros. Beverage Co. v. N.L.R.B., 294 F. 2nd 529	31, 66, 90, 112
Motoshige, ex parte, 6 F. Supp. 792	164
Mulchaey v. Catatalnotte, 353 U.S. 692	71
Murff ads United States, 170 F. Supp. 182	32, 49, 68, 136
Murrel v. Stock Grower's, 74 F. 2nd 827	132
Nechman ads United States, 183 Fed. 788	44, 165
Ness ads United States, 245 U.S. 319	48, 114

	PAGE
Nowak v. United States, 356 U.S. 660	29, 203
Oklahoma ex rel Comm'rs v. United States, 135 F. 2nd 496	95
Oklahoma v. Texas, 272 U.S. 21, 52	112, 126
Page, in re, 206 Fed. 1004	105
Parisi ads United States, 24 F. Supp. 414	129
Parr v. United States, 363 U.S. 370, 388	31, 66, 90, 113
Perkins, in re, 204 Fed. 350	168
Pezzi, in re, 29 F. 2nd 999, 1001	117
Polites v. United States, 365 U.S. 426	63, 199
Pollock, in re, 257 F. 350	96
Powers, in re, 115 F. 2nd 69	129
Profaci ads United States, 274 F. 2nd 289	63, 116, 202
Reimer ads United States, 96 F. 2nd 217	52, 155
Richmond ads United States, 184 F. Supp. 75, 78	66
Richmond ads United States, 17 F. 2nd 28	45, 66, 113
Roberson ads United States, 233 F. 2nd 517	51, 144
Rodiek ads United States, 117 F. 2nd 588	179
Rosenfeld v. Lion Mfg. Corp., 253 F. 2nd 90	48, 120
Rossi ads United States, 171 F. Supp. 451	109
Russell v. Place, 94 U.S. 606	130
Sanders v. Clark, 76 F. Supp. 489	97
Savoretti ads United States, 200 F. 2nd 546	187
Schlotfeldt v. Leibowitz, ex rel. United States, 94 F. 2nd 265	154

	PAGE
Schneiderman v. United States, 320 U.S. 118, 161	47, 78, 99, 119
Sciria ads United States, 136 F. Supp. 458	35, 77, 80
Seagram Distillers Corp. v. New Cut Rate Liquors, 245 F. 2nd 453	132
Sealfon v. United States, 332 U.S. 575	108
Semmes v. United States, 91 U.S. 21, 1 Otto 21	122
Shapiro ads United States, 43 F. Supp. 927	147
Shaughnessy v. United States, 345 U.S. 206, 212	53
Shaughnessy ads United States, 221 F. 2nd 578	30, 63, 85
Shaughnessy v. Pedreiro, 349 U.S. 48	8
Sherman v. Hamilton, 295 F. 2nd 516	148
Shomberg v. United States, 348 U.S. 540, 546	34, 70, 73
Shuell v. London Amusement Co., 123 F. 2nd 302, 306,	164
Siegel ads United States, 152 F. 2nd 614	48
Silva v. Tillinghast, 36 F. 2nd 801	161
Smith v. Fidelity & Casualty Co., 261 F. 2nd 460	194
Smith v. Hays, 10 F. 2nd 145	174
Smith ads United States, 36 F. 2nd 503	34
Smith ads United States, 62 F. 2nd 808, 815	85
Smith v. United States, 157 F. 2nd 176, 185	139
Stevens ads United States, 64 F. 2nd 853	97
Stromberg ads United States, 227 F. 2nd 903	30, 43, 65, 89, 102
Syms v. McRitchie, 187 F. 2nd 915	132

	PAGE
Tait v. Western Maryland Railway Co., 62 F. 2nd 933; 289 U.S. 620	132
Throckmorton ads United States, 98 U.S. 61	45, 113
Tisi v. Tod, 264 U.S. 131	143
Tod ads Tisi, 264 U.S. 131	143
Toledo Scale Co. v. Computi: Scale Co., 261 U.S. 399, 421	45, 113
Tooma ads United States, 187 F. Supp. 928	114
Tseung Chu v. Cornell, 247 F. 2nd 929, 933	179, 184, 189
Tutun v. United States, 270 U.S. 568, 578	45, 99, 117
Tuttle ads United States, 46 F. 2nd 342	190
Twentieth Century Fox Film Corp. v. Lardner, 216 F. 2nd 844	184
Uhl ads United States, 107 F. 2nd 399	184
United Shoe Machinery Corp. v. United States, 258 U.S. 451, 459	99
Uhl ads United States, 210 F. 860	184
Universal Camera, 340 U.S. 474, 488	53
Uranium Co. v. Benton, 149 F. Supp. 667	132
Ussi v. Folsom, 254 F. 2nd 842	162
Vajtauer v. Comm's of Immigration, 273 U.S. 103	138
Vasicek, in re 271 Fed. 326	117
Verbeem v. United States, 154 F. Supp. 431, 435	122
Ver Pault, ex parte 86 F. 2nd 113	161
Vicksburg v. Henderson, 231 U.S. 259	112, 126

	PAGE
Vidal Planas v. London, 104 F. Supp. 384, 389	186
Viruette Torres v. Hoy, 269 F. 2nd 289	109
Vlisidis v. Holland, 245 F. 2nd 812	32, 68, 137
Wabash Corp. v. Ross Electric Corp., 187 F. 2nd 577, 592	130
Walker ads. United States, 109 U.S. 258	122
Walker v. Montgomery, 256 Ill. 244, 86 N.E. 240	125
Wong Kay Suey v. Brownell, 227 F. 2nd 41	37, 85
Wong Yang Sung v. McGrath, 339 U.S. 33	199
Wyoming v. Colorado, 286 U.S. 494 (1932)	95
Yates v. United States, 354 U.S. 208, 335	99, 168
Yiannapoulos v. Robinson, 247 F. 2nd 655, 657	53, 56, 149, 171
Zacharis v. Shaughnessy, 221 F. 2nd 558	30, 64, 85
Zito v. Moutal, 174 F. Supp. 531, 537	53, 149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PAUL DE LUCIA

v.

WILBOR T FLAGG

PETITION

For a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

I

The Opinions of the Courts Below

The opinion of the Court of Appeals has not yet been reported. It appears in this record and has been copied in the Appendix, hereinafter. The opinion of the Hearing Officer is in the Appendix printed for the court below (App. 1). Also the opinion of the Board of Immigration Appeals (App. 12). The opinion of Judge Perry (App. 26) and the brief sent to the Government on petition for review of the Administrative Agency appears also in the Appendix, hereinafter.

In related cases, the Naturalization Court, Judge Wilkerson rendered no opinion. The opinion of Judge LaBuy in the Denaturalization case is reported in *United States v. DeLucia*, 163 F. Supp. 36, affirmed 256 F. 2d 487, certiorari denied 358 U.S. 836. The opinion of the Court of Appeals in the contempt case is reported in 256 F. 2d 489. All three of these opinions have been here appended, pp. 801, 813, 823.

In the denial of the motion for leave to proceed in the District Court, herein pp. 865, 871, the Court of Appeals rendered no opinion.

II.

Jurisdiction.

The date of the judgment to be reviewed is December 4, 1961. Our Petition for Rehearing was denied January 11, 1962. Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A. sec. 1254). Based on the Title 28 U.S.C. 1940 ed. §§346 and 347 (Mar. 3, 1911, c. 231, §§239, 240, 36 Stat. 1157; Feb. 13, 1925, c. 229 §1, 43 Stat. 938; Jan. 31, 1928, c. 14§ 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926) from Revisor's Note Title 28 U.S.C.A. Judicature and Judicial Procedure §1254 p. 429.

Jurisdiction in the District Court was founded upon the Declaratory Judgment Act, 28 U.S.C. §2201 and the Administrative Procedure Act, 5 U.S.C.A. §1009, 60 Stat. 243.

The date of the denial by the Court of Appeals of leave to petition the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure in *United States v. DeLucia*, No. 26674 1971 was January 11, 1962. Jurisdiction to issue the writ is to be found in 28 U.S.C.A. §1651 (a) known as the all writs section of the Judicial Code.

III.

Questions Presented.

6. If it be held that the savings clause was not intended by Congress to be applicable and the 1952 Act is intended to operate retroactively is such legislation a valid exercise of Congressional power despite the doctrine of res judicata?

7. What legal effect should be given by an Administrative Agency to a decree of denaturalization in considering issues previously determined in a naturalization proceeding?

8. Should the Government be estopped by proceedings had in a denaturalization case from again litigating in a deportation case, issues which might have been litigated but were not, in the denaturalization case?

9. As grounds for cancellation, Congress shifted from fraud and illegal procurement (§340(a)) to concealment of a material fact or wilful misrepresentation (8 U.S.C.A. §1451 (a)).

(a) Did the denaturalization court have jurisdiction to cancel on the ground of illegal entry?

(b) Did the denaturalization court in fact base its decree in any part on illegal entry?

(c) If not, did not the denaturalization decree leave standing the judgment of the naturalization court as to a legal entry?

(d) If in fact the complaint in the denaturalization case can be held to include a charge of illegal entry and the undisputed evidence before the denaturalization court showed a legal entry, can it not be said that the doctrine of estopped applies?

(e) If as a matter of law the denaturalization court had jurisdiction to cancel the finding made by the nat-

uralization court as to entry and did not so do, is not the Government estopped because of the opportunity afforded in the denaturalization court?

10. Can an administrative hearing be said to be fair where it appears that the Hearing Officer placed the burden on petitioner to show that his entry was lawful?

11. Can an administrative hearing be said to be fair where it appears from the record that the Hearing Officer was mistaken in holding that petitioner was not entitled to the protection of the Fifth Amendment and that Officer recorded the refusal to testify as a failure to meet a burden of proof wrongfully placed by that Officer on petitioner?

12. Can a hearing be said to be fair where it appears from the record that the Hearing Officer considered evidence introduced in the absence of petitioner?

13. Can a hearing be said to be fair where it appears that the Hearing Officer relied upon certain foreign documents without proper foundation without proof that petitioner was in fact the person named therein?

14. Can a hearing be said to be fair where it appears that the Hearing Officer has

(a) made conclusions of fact not proven and in contradiction of circumstances proven?

(b) improperly construed §291 of the McCarran Act, 8 U.S.C.A. 1361, so as to cast the burden on petitioner to prove legal entry and to penalize petitioner for claiming privilege and not testifying as to entry, after entry had been proven.

(c) took evidence in the absence of plaintiff.

(d) refused to accept the legal effect of prior decisions and judgment concerning matters again put in issue.

(e) refused to accept the nondeportable status of petitioner as preserved by the saving clause of the McCarran Act of 1952.

(f) made serious mistakes as to the law.

(g) failed to require the Government to prove the law of Italy as a fact in the case.

(h) failed to notice the effect which should have been given to the suppression of evidence in the possession of the Government.

(i) made an arbitrary decision as to the facts and the law involved.

(j) regarded petitioner as if he now stood at our gates seeking admission rather than a resident entitled to due process of law.

15. Is the provision in the statute about the exclusion of aliens having been convicted of a crime involving moral turpitude so vague as to be unconstitutional?

16. What is the legal effect to be given to the change in the denaturalization statute, 8 U.S.C.A. 1451(a)? Did the courts below err in holding that the Savings Clause in the McCarran Act preserved the jurisdiction under the previous statute in denaturalization cases instituted after 1952?

17. The Government has taken the following position based upon *Schneiderman v. United States*, 320 U.S. 118 and other cases decided under the old law:

> "Congressional bar makes inapplicable to these proceedings the doctrine of *res judicata*; nor are estoppel and laches applicable to the Government in these proceedings."

The question presented is what effect did the shift of ground explained in *United States v. Stromberg*, 327 U.S. 265, have on the above proposition?

18. Should the Court of Appeals have granted petitioner's motion for leave to file a petition in the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure?

The Constitutional Provisions Involved.

Art. I, §9 of the Constitution providing that:

"No Bill of Attainder or ex post facto law shall be passed".

Fifth Amendment

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . .

Statutes Involved.

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

Section 241, (a), 66 Stat. 204, 8 U.S.C. (1952 Ed.) 1251 (a):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

The Savings Clause and other statutes are to be found in Appendix B, hereof, p. 852.

PETITION

To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

May it please the Court:

The petition of Paul DeLucia respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

This is a deportation case. After a hearing before the Administrative Agency petitioner was ordered to be deported on two grounds which we copy from the order to show cause (App. 84)*

5. You were not then in possession of an unexpired passport or official document in the nature of a passport showing your origin and identity;

6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

After the Board of Immigration Appeals dismissed the appeal (App. 129) petitioner presented his petition for review to the District Court (App. 3).

The jurisdiction of the District Court was not questioned. It was founded upon the Declaratory Judgment Act 28 U.S.C. §2201, *Brownell v. Tom We Shung*, 352 U.S. 180, and the Administrative Procedure Act, 5 U.S.C.A. §1009, 60 Stat. 243, *Shaughnessy v. Pedreiro* 349 U.S. 48.

---

* Reference is here made to the Appendix printed for the Court of Appeals in No. 13365

Judge Perry granted a motion for summary judgment (App. 246). This judgment was affirmed by the Court of Appeals, herein p. 845.

Petitioner came to this country in 1920. The Immigration Act of 1917, 39 Stat. 874, 889, 8 U.S.C. (1934 Ed.) was then in effect. Deportation proceedings could have been brought against petitioner at any time within five years after his entry, on the grounds here alleged to have existed. No such proceedings were brought and petitioner became immune from deportation on said charges under the then existing law.

Petitioner passed inspection at the Port of New York and was allowed to enter as an immigrant for permanent residence. The quota law had not been enacted. It is contended that the determination by the Officials in 1920 that petitioner was then legally entitled to enter had the presumption of correctness. The Government assuming that this presumption was rebuttable, undertook to prove by circumstantial evidence that the passing of petitioner was due to a mistake on the part of the officials.

It is claimed in effect by the Government that this mistake was made because of misrepresentation made by petitioner. There is no evidence concerning what took place in the way of representations to the Inspector, true or false.

It is contended by petitioner that the Government had the burden of proof on this subject and that this burden was not met.

In view of the rule that the decisions of Immigration Officers in a deportation hearing on questions of fact are conclusive if supported by evidence, we inform Your Honors at the outset that there is not involved here

(a) credibility of witnesses.

(b) conflicts in evidence.

It is claimed however that the Government failed to prove its case. The Hearing Officer made inferences from circumstances in proof and then made further inferences based upon the first inferences. The Hearing Officer also made inferences which were contradicted by the undisputed facts in the record. This condition of the record requires close attention to the details of proof. We point out the total absence of evidence in vital areas.

The Administrative Agency erroneously construed Section 291 of the Immigration Act to cast the burden of proving a legal entry on petitioner (App. 103).

Petitioner contended that all Section 291 required was proof of the time, place and manner of entry. Such proof had been established before petitioner was called upon to testify, by uncontradicted exhibits in the record before the Hearing Officer.

After a residence in the United States for five years, in 1925, petitioner filed in the Circuit Court of Cook County his Declaration of Intention (App. 267). In this Declaration, petitioner under oath, furnished the facts required as to time, place and manner of entry. In 1928, petitioner executed a Preliminary Form for Petition for Naturalization (App. 206).

Stephen A. Durisch (App. 139), a Naturalization Examiner, testified that he did not remember petitioner, but he recognized his handwriting on what is called a Face Brief (App. 205). The witness told of the usual custom as to how applicants were put under oath and examined. Certain check marks were identified and explained. The Designated Examiner was identified as Mr. McKay, who had died before the trial. The markings on the Face Brief indicated that Mr. McKay had examined petitioner and his witnesses and had indicated his approval of the application for citizenship. Andrew Jordan, (App. 167) testified that he did not remember petitioner or the event, but from the

markings on the Face Brief he concluded that he had been in court representing the Immigration Service, as Designated Examiner, at the time that petitioner was granted citizenship. Both witnesses, Durisch and Jordan, gave testimony to show that it was customary for the Examiners to check over with an applicant the contents of his preliminary form and to prepare his petition for naturalization. Insofar as their evidence shows the matter involved in the case at bar, petitioner had truthfully answered all questions as to time, place and manner of entry.

The subject of a passport for petitioner was not mentioned by these witnesses, nor was any other question concerning entry discussed, further than that a check of the answers made by petitioner in the various papers corresponded with the records as to time, place and manner of entry.

The witnesses explained how the Certificate of Arrival was obtained for an applicant. Petitioner was not required to do anything more than to answer the questions about time, place and manner of entry.

The Certificate of Arrival was obtained by the local Examiners before the Declaration was filed. It was kept in the field headquarters for future use when required by the Examiners. (App. 174)

Section 4 of the Act of June 29, 1906, provided that it was the duty of the Bureau to keep books of record and to cause a Registry to be made in the case of each alien arriving in the United States showing the place of birth, the last residence, the intended place of residence, date of arrival and the name of the vessel. The contents of any such registration was not proved by the Government, either before Judge LaBuy or before the Hearing Officer.

The testimony of Durisch and Jordan was said to furnish part of the circumstantial evidence to show the falsity of

the following answer made by petitioner in 1928 in his Preliminary Form (App. 211).

24. Have you ever been arrested? No.

It was contended on behalf of petitioner before Judge LaBuy, partly because of previous questions about the United States, that the above question referred to arrests in the United States. Judge LaBuy regarded the question as if it required an answer about an arrest in Italy. The theory of the Government after the evidence was heard before Judge LaBuy was that a false answer to the above question No. 24 gave support to the following finding made by Judge LaBuy, herein, p. 812:

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him".

Under this theory, it was not necessary to prove conviction. The theory was that any arrest whether there had been a conviction of a crime involving moral turpitude or not, whether of a felony or a misdemeanor, was a material fact of which the Naturalization Examiners were entitled to be advised. It is contended that materiality should be judged from the situation as it existed in 1928.

With the assistance and approval of the Immigration officials, petitioner filed his Petition for Naturalization (App. 212)* to which was attached a Certificate of Arrival in due form giving the time, place and manner of arrival.*

* The exhibits were before the Hearing Officer and the various courts. They have been certified to this Honorable Court. Photostat copies were printed for use below and appear in Vol. II of Appendix in No. 12903. Much of their contents have been printed in the Appendix for No. 13365.

All of the exhibits were admitted in evidence before the Hearing Officer by stipulation as shown (App. 88). Therefore we make no further reference to the page number at which any exhibit was offered in evidence.

After the Petition for Naturalization was approved, Judge Wilkerson entered an order of court admitting petitioner (App. 239), herein p. 863. This order was based upon the petition and affidavits in support, together with further testimony taken in open Court. The order included the following:

"By order of Court, name changed from Paul Maglio."

In 1957 Judge LaBuy entered a Decree of Denaturalization (App. 244) including the following:

"• • • the order • • • admitting the respondent Paul DeLucia also known as Felice DeLucia to citizenship, be and is hereby revoked, set aside and made void;

• • • the Certificate of Naturalization • • • be and the same is hereby cancelled;"

Judge LaBuy wrote an opinion, herein p. 861, reported in *United States v. DeLucia*, 163 F. Supp. 36; affirmed 256 F. 2nd 487, herein p. 813, certiorari denied 358 U.S. 836.* The following is quoted from the opinion of Judge LaBuy, p. 41 herein p. 811:

"Stephen Durisch and Andrew Jordan both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition by Paul DeLucia was processed in the customary way, leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such

* The record made before Judge LaBuy was printed in full in No. 13993 for the Court of Appeals, printed copies were filed in this Honorable Court. Also the printed record, together with the briefs was borrowed by Hearing Counsel and the courts below. All have been certified here as exhibits. Pertinent parts were again printed for use in No. 13365.

failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office."

Before the Hearing Officer, the parties stipulated (App. 88) that if the witnesses who had appeared before Judge LaBuy were again called, they would testify as shown by the printed Appendix in No. 12963.* Counsel for petitioner requested, and was granted the right to make objections. (App. 94). The exhibits before Judge LaBuy were introduced before the Hearing Officer. These exhibits were certified to Judge Perry, then to the Court of Appeals and are before this Honorable Court.*

As the Government had made no effort before Judge LaBuy to prove an illegal entry there was introduced before the Hearing Officer by stipulation the testimony of Mr. Ferro, an Inspector (App. 90) familiar with the procedure in use by Inspectors. Mr. Beck, the Inspector who had admitted petitioner had died before the hearing. Mr. Ferro said that if an immigrant had arrived without a passport he would have been held for a Board of Special Inquiry. Petitioner was not so held, otherwise a notation to that effect would have been found on the Manifest. The Hearing Officer found (App. 121):

> "The evidence in the record has established that the respondent entered the United States in August 1920 by assuming the identity of Paolo Maglio and was not held for hearing before a Board of Special Inquiry. It is reasonable to conclude that at the time of his admission the respondent presented a passport in the name of Paolo Maglio and thereby gained entry into the United States. It has been established that the

---

*Photostats of some of the exhibits appear in Appendix Vol. II of No. 12963. Also they appear in printed form in the Appendix of No. 13365. The order of the Court of Appeals directing the Clerk to transfer the exhibits and briefs of the parties is shown herein, p. 870.

respondent is not Paolo Maglio and that he is, in fact, Echee DeLucia. He, therefore, did not present a passport showing his true identity; he was not the person described therein; and the passport presented did not constitute a passport within the provisions of the Executive Order."

manifest and his passport. The ship doctor made an affidavit as to each manifest (App. 268, 272) and it can be inferred that the doctor checked the personal description of each immigrant as appears on the Manifest with the person described. A personal description of petitioner is to be found in Ex. 4 (App. 267), his Declaration of Intention and in Ex. 5 (App. 216) his Certificate of Naturalization. In concluding that petitioner assumed the identity of the witness, the Hearing Officer looked to circumstances to support that conclusion and ignored circumstances to make such conclusions impossible of support. To name a few, the witness was described as being 5'3" high, weighed 115 pounds, color of hair black, color of eyes blue. Petitioner has been described in various exhibits, including a height of 5 feet 7 inches, weight 145 pounds, fair complexion, eyes of brown.

Judge Perry said (App. 260), herein p. 841:

> "One who presents a passport issued in the name of another is not presenting identification of himself."

It will be observed that before the Administrative Agency and in the courts below the identification of a holder of a passport was limited to the name used. Other points of identification were ignored, *e.g.*, facts to show that there were two different passports issued to two different persons. Ignored also is the fact that each of these persons had his own visa. The Visa issued by the American Consul to the witness appears on his passport (Ex. 14K, App. 273). It may be assumed that petitioner had a visa, otherwise he would have been denied admission.

Judge Perry said (App. 261), herein p. 841:

> "In misrepresenting, as he did, his true identity, he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence as to what petitioner may have represented to the American Consul, true or false, although it is apparent that this evidence is in the hands of the Government.

Francis Rando testified (App. 154) that he was attorney adviser with the Department of State, that he knew the language and had previously resided in Italy, while special officer with the State Department, in foreign service. In 1956 he was ordered by his superior of the Passport Office to proceed to Italy, consult with American personnel and assist in obtaining certain documents which he brought back. The documents put in evidence did not include anything concerning a passport, a visa, an application for a visa, or any paper concerning the matter of entry concerning petitioner. It is contended that the Government suppressed documents and records which might have contradicted the theory of the prosecution.

Although witness Maglio had previously taken the stand before Judge LaBuy (App. 147) and had produced his passport (Ex. 14 K, App. 233), Mr. Rando was asked no questions as to what he may have learned concerning the issuance of the passport to petitioner or for the witness Maglio. Mr. Rando was asked no questions about the issuance of a visa for petitioner or for the witness Maglio. No attempt was made by the Government to account for the absence of any papers, records or other evidence upon this subject. This gap in the evidence was regarded as of no importance by the Government when before Judge LaBuy as the matter of entry was not being litigated. The Hearing Officer gave no heed to the gap due to a misapprehension as to which was the burden of proof. The Hearing Officer assumed that the burden was on petitioner to show lawful entry.

The manifest (App. 268) shows that petitioner boarded the ship in Bologne, France. The record does not show whether petitioner obtained his visa in France, Italy, or where.

It is contended by petitioner that this failure to produce evidence within the control of the Government gives rise to the presumption that if produced the evidence would operate against the Government and every intendment should be resolved in favor of petitioner. The Complaint in the denaturalization case was filed in 1956. Nowhere in any of this litigation did the Government undertake to prove that the American Consul and the Immigration Officials had no knowledge of the facts upon which the Complaint was based and no knowledge of the facts supposed to support the deportation order as to what took place when petitioner entered the United States. The evidence shows that the status of petitioner changed when he was given his visa, when he passed inspection, again when he filed his Declaration of Intention and five years had elapsed from the time of his entry, again when he filed his Petition for Naturalization and still again when he was found by Judge Wilkerson to have acquired a legal residence here, which had been maintained for over five years. It is contended by petitioner that the Government left a serious gap in its case when it failed to prove when knowledge came to the officials. It is contended that even if there had been misrepresentations and a new relation is effected subsequent to the disclosure the legal status of that relationship is the same as if the misrepresentation had never been made.

In preparation to try the denaturalization case, the United States Attorney took the deposition of petitioner (App. 264, App. 23 in case No. 12993). Petitioner claimed the privilege against self-incrimination. Judge LaBuy held

that petitioner was not entitled to the privilege and sentenced him for contempt. This conviction was reversed. *United States* v. *DeLucia*, 256 F. 2d 493. The Court of Appeals said, p. 495; herein p. 826:

> "(3) It is apparent from the record before us that DeLucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute DeLucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court."

Before the deportation case was heard, Mr. Freedman, the Examining Officer, caused petitioner to be served with a subpoena *duces tecum* (Ex. A 56; App. 277), commanding petitioner to produce his passport or other document presented when petitioner entered on August 20, 1929. At the hearing petitioner explained that he had searched and that he had moved several times and was unable to find these papers. (App. 27)

Mr. Freedman called petitioner as a witness. Petitioner refused to answer questions concerning his entry into the United States, claiming privilege guaranteed by the Fifth Amendment. Mr. Freedman and the Hearing Officer took the position that § 291 required petitioner to testify. Petitioner through his counsel took the position that § 291 required only proof of the time, place and manner of entry, which evidence was already before the Hearing Officer by stipulation. In an effort to show that petitioner had reasonable ground to fear prosecution and consequently a right

to the protection of the Fifth Amendment counsel for petitioner addressed the Hearing Officer as follows: (App. 101)

> "Mr. Stewart: Paul DeLucia is now defendant in a matter, where he was convicted of income tax evasion, and that case is pending in the Circuit Court of Appeals. The court recently rendered an opinion dismissing two of the counts and affirming the third; and it is his intention to proceed further, as the law permits him to, and he faces various prosecutions, and investigations concerning other matters and if he were to testify here he will be compelled to be a witness against himself and that could be used in other prosecutions. Now, in answer to the remark made by your Honor, in a case such as this, where it is charged that Paul DeLucia entered this country and that was an illegal act, there are many ramifications which haven't been shown to this court but they appear in the transcript. So, if your Honor will take into consideration that which is already in the exhibit, (the record made before Judge LaBuy) it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy . . . that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under federal laws. So, if your Honor will, before you finally rule on whether you will direct him to answer, if you will consult the transcript . . . and then, I might say to you that questions similar to this were asked of him in the denaturalization hearing, in a deposition, and he claimed the Fifth Amendment and Judge LaBuy ruled that he didn't have the right to claim the Fifth Amendment. One reason given was pretty much the same as expressed by your Honor . . . one expressed in the *Costello* case; but this is different than the *Costello* case. And then we carried on. After Judge LaBuy sentenced Paul DeLucia for contempt of

court we took that up to the Circuit Court of Appeals and the court said we were right — we were within our rights in refusing to answer. So, I believe your Honor should be influenced by the opinion in the Court of Appeals and not rule that Paul DeLucia is not within his rights when he claims the Fifth Amendment. And I could, of course, go further and point out more reasons but I think enough of them are now in the record. If that transcript be consulted and if the opinion of the Circuit Court of Appeals be consulted, it will be seen that Paul DeLucia is within his rights in refusing to answer. Could I suggest that you take that under advisement, along with the case?"

Special Inquiry Officer: "I, of course, have not seen the transcript or any of these fifty-one exhibits that were introduced in the cancellation and, accordingly, in view of the statements made by Mr. Stewart, I will reserve ruling on the claim of privilege under the Fifth Amendment at this time."

The Board of Immigration Appeals said (App. 131):

"The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 USC 1361)."

The position of the Government is shown by the following (App. 103):

"Mr. Freedman: However, I would like to make this statement, that the Immigration law requires that the burden is upon the Respondent to show the time, place and manner of his entry and, regardless of the fact that he refuses to answer those questions under the Fifth Amendment, an adverse inference can be drawn, and such inference can be drawn from his failure to testify to those matters upon which he has the burden of proof. Now, I am not implying that an inference will be drawn because he claimed the Fifth Amendment, but I do say an inference can be drawn

by reason of the fact that he has not testified to those matters which he has to establish by the preponderance of the evidence and which the law requires him to establish."

We again quote from the opinion of the Hearing Officer (App. 109):

"As a basis for declining to answer these questions, the respondent invoked the privilege against self-incrimination under the Fifth Amendment. The respondent was informed of the provisions of Section 291 of the Immigration and Nationality Act, which provides, in part, that in any deportation proceeding the burden of proof shall be upon the person under deportation to show the time, place and manner of his entry into the United States, and that if such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law. Counsel for the respondent was asked whether he wished to present any evidence in this matter and he stated that he would offer no additional evidence and that the evidence relating to the respondent's entry into the United States was already in the record."

Counsel for petitioner said the following (App. 104):

"Mr. Stewart: May I call your Honor's attention to the fact that that regulation just read doesn't state how that proof shall be made and it is our position that the proof of the entry has already been made and you will find it in those exhibits.

Hearing Officer: Well, I will consider the issue in examining the transcript and the exhibits in the record."

Judge Perry said (App. 252), herein p. 833:

"The Petitioner claimed privilege under the Fifth Amendment when asked by the Examining Officer under what name he had entered the United States—whether he denied that he entered under the name of Paolo Maglio what his name was at birth—whether he denied that his true and correct name was Felice

DeLucia whether he had a passport at the time of his entry at New York, New York, on August 12, 1920, a passport in the name of Felice DeLucia—whether he had at the time of his last entry, at New York, on August 12, 1920, a passport in the name of Paolo Maglio and whether it was not true that he entered the United States at the Port of New York on August 12, 1920, in the name that was assumed and not his true and correct name. No further questions were asked of him by the Examining Officer."

It is contended that by the above, Judge Perry upheld the Hearing Officer and approved of the view expressed by Mr. Freedman that the effect of Section 291 is to abrogate the Constitution, so long as the questions pertain to an alleged illegal entry.

In an effort to prove (App. 84):

6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

And without any proof that petitioner is the person named therein, the Government introduced Ex. 36 (App. 224) which includes the following:

"Whereas, Felice Delucia was found by the jury to be guilty of voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances; Whereas it is deemed appropriate to set the penalty, under Articles 364 51 55 of the Penal Code, at imprisonment for 3 years, reduced by 1 6th by reason of the extenuating circumstances, for the homicide, and at 4 months attachment reduced by one-half (Art. 56) and then by 1 6 because of the extenuating circumstances, for the carrying of a gun, the remainder to be reduced by one third for concurrence of sentences, an addition of a pecuniary penalty of 145 lire."

There had been no proof of the law of Italy before the Hearing Officer. When the Hearing Officer had the case

under advisement, he had before him our brief in the denaturalization case now here as an exhibit. We quote p. 90:

> "Now if Your Honors will look at Ex. 36, p. 18 it will be seen that it purports to be a conviction of 'Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.'
>
> We have no such crimes in this country. The Government did not see fit to put anyone on the stand to explain and prove the law of Italy. If we try to understand in the terms of our statute we know that our chapter on Homicide includes killings which are not criminal."

In order to meet this objection, the Hearing Officer attached an appendix to his opinion (App. 125). This evidence was taken in our absence without notice and without any opportunity to cross examine.

We quote from the opinion of the Board of Immigration Appeals (App. 130):

> "Exceptions have been taken to the finding of deportability. Counsel urges that the evidence is insufficient to support the order of deportation and that the special inquiry officer's conclusions are contrary to law. It is alleged that the special inquiry officer considered matters not introduced in evidence in the absence of proof."

That is all that was said about matters not in evidence. The Board did not rule expressly on this claim of error.

The position of the Government is as follows (Brief p. 29, here as part of the record):

> "Petitioner's objection seems to stem from the ancient supposition that foreign statutes must be proved as a fact. But this is merely a rule of evidence sometimes applied by the courts. See 9 WIGMORE EVIDENCE

(3rd Ed.) 558, *et seq.*, McCormick, Evidence, 698. This rule evolved when communication was difficult and sources of knowledge less accessible. Its validity under modern conditions has been doubted by leading scholars.' Id.""

We quote from Judge Perry (App. 263), herein p. 844:

> "This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute."

That is all Judge Perry said on the point. Perhaps Judge Perry meant to say that the Appendix (App. 125) attached to the opinion by the Hearing Officer was not in fact evidence.

There is no proof that the evidence was the law of Italy or that it had any application to the issues presented to the Hearing Officer. The Hearing Officer regarded the Appendix as evidence and based his findings to a large extent on this evidence. There was no evidence in the record, including that taken in the absence of petitioner that the five codes are in fact copies of the Italian law, that they are complete, or that they apply to Ex. 36 (App. 224). No attempt was made to show where or when the Hearing Officer obtained his information. The Court of Appeals said herein p. 849:

> "Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion."

In this manner, the Court of Appeals has permitted the Government to prevail upon one ground in the Administra-

tive Agency tribunals and upon another and different ground in the Court of Appeals. It is contended that this new ground finds no support in the law or in the evidence.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this—

(a) I find a definition of a crime in the statute.

(b) I believe that the definition is intended to cover crimes in which theft had been moral turpitude.

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition.

Judge Perry said (App. 262), *supra* p. 843:

> "It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed, particularly in view of the findings made by Judge LaBuy in the denaturalization case."

It is contended that Judge Perry considered only a portion of petitioner's claim of *res judicata*. If the findings made by Judge LaBuy be studied, four points will appear:

(a) Judge LaBuy did not have jurisdiction to base his decree on illegal procurement.

(b) A decree based upon proof of an improperly obtained Certificate of Arrival, an illegal entry without a proper passport or a conviction in Italy, would be a decree based upon illegal procurement.

(c) Judge LaBuy did not in fact base his decree on any of the grounds mentioned above in (b).

(1) The matters above mentioned in (b) were not litigated before Judge LaBuy.

The Court of Appeals said in the case at bar, herein p. 851:

> "The government entered in the denaturalization proceeding [after respondent's certificate of citizenship had been surrendered] is one which the doctrine of res judicata does not apply."

It is contended that this finding constitutes an error of law. Judge LaBuy said (App. 256), herein p. 837:

> "In this case petitioner argues that although [the statute] provides two grounds for vacating a naturalization decree, i.e., (1) fraudulent procurement and (2) illegal procurement, the 1952 amendment of Section 340 (a) [8 U.S.C. (1958 Ed.) 1451(a)] omitted the ground of illegal procurement. As set forth in the 1952 Act the grounds are that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. Subsection (e) of amended Section 340 [8 U.S.C. 1451(e)] provides: 'The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.'
>
> "This Court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952. In this connection it should be observed that in the

opinion of the Court of Appeals in the denaturalization case (256 F. 2d 485), Judge Schnackenberg said, at page 491:

> "We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization *was allegedly and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry.)

Petitioner contends that if the above use of the words *illegally and fraudulently procured* was understood by Judge Perry as an enlargement of the base of the decree entered by Judge LaBuy, then Judge Perry overlooked the duty of a review court to not order initial findings of fact or to interject a theory not supported by the record. Petitioner contends that after the effective date of the McCarran Act, illegal procurement was not continued as a ground for denaturalization. The issue presented to Judge LaBuy was whether the following allegation was false (App. 211):

> "24. Have you ever been arrested? No."

Judge LaBuy concluded [illegible] that the [illegible] was false, although Judge LaBuy did not state [illegible] Buy [illegible] p. 81):

> "The court holds that the use by the defendant of a name other than his own, his failure to disclose his true identity and the concealment of other material facts which [illegible] certificate of citizenship granted to him."

The Court of Appeals in affirming Judge LaBuy said, herein p. 8):

> "While the court did not expressly indicate what it meant by the words 'the concealment of other material facts', it is apparent to us from the context of the

[illegible] that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum."

The "failure to reveal" here must refer to the time when petitioner was examined by Mr. Dupuch, eight years after entry. When petitioner was under examination by Mr. Dupuch in 1925 the "failure to reveal," if there had been a failure, could not very well have been about entry, because in 1925 petitioner had an immunity against deportation on the ground of illegal entry. It is contended that even if Congress had the right to take away that immunity in a retroactive way, it did not. Congress could not reach back and take away the material which was immaterial when the questions were asked.

[illegible] Appeals for leave to [illegible] Court pursuant to Rule [illegible] Writ Procedure, before p. [illegible]. The [illegible] p. 851. The grounds upon which [illegible] presented to the Court of Ap[illegible] before p. [illegible]. The Govern[illegible] opposition, before p. [illegible]. Since [illegible] Latin, Your Honors have [illegible] U. S. 213, making it [illegible] to turn the clock [illegible] should be judged [illegible] the time of the act of the de[illegible] regarded *Nardi v. United* [illegible] the Latin decree. It is our [illegible] should have an opportunity to [illegible] the light of these [illegible] cases.

B.

Summary of Argument.

Conflict in Construction of McCarran Act as to Status acquired by Petitioner.

There is a conflict between *United States ex rel. Zacharis v. Shaughnessy*, 221 F. 2d 578, decided in the Second Circuit and the case at bar decided in the Seventh District. The *Zacharis* case construed the McCarran Act, § 405(a), 8 U.S.C.A. § 1101 note, to give an alien a "status condition, or right in process of acquisition" as to which statutes repealed by the McCarran Act were continued in force by savings clause. In the case at bar, the Court of Appeals held that the savings clause did not apply, although petitioner had taken steps to become a citizen under prior law and long before the enactment of the McCarran Act.

Conflict as to Doctrine of Res Judicata.

In the Third Circuit in *Angelopoulos v. Hurdin*, 208 F. 2d 165, it was held that the doctrine of *res judicata* applied where the alien had previously secured a judgment fixing his status in a deportation proceeding. In the Seventh Circuit in the case at bar, the Court of Appeals has refused to apply such doctrine.

Conflict as to Jurisdiction in re Denaturalization.

In the case at bar in the Seventh Circuit, it has been held that Section 305 gives illegal procurement as a ground for denaturalization. In the Fifth Circuit, in *United States v. Stromberg*, 217 F. 2d 903, 907, we find an opposite holding. In *United States v. Zellner*, 250 F. 2d 487, the Court of Appeals interpreted illegal procurement as a ground for denaturalization and Judge Perry accepted such interpretation as the law of the case.

It is important that the law be settled by Your Honors. If the law is to be held as correctly stated in the Fifth Circuit in *Strombeck* and the Court of Appeals, in the Seventh Circuit is wrong, a prejudicial error has been committed. If illegal procurement was not continued by Congress, Judge LaBuy had no jurisdiction to decide the questions thought by Judge Perry to have been decided. Also the interjection of illegal procurement by the Court of Appeals was an interjection on a matter beyond the jurisdiction of Judge LaBuy. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529, and *Perez v. United States*, 313 U. S. 1, 8, 9, should have reminded the courts below that finality and theories should not enter any case for the first time on appeal. Judge Perry in quoting the portion quoted by the Court of Appeals erred in not applying the rule stated in 50 C.J.S. Judgments § 603, 624, pp. 36, 50:**

> "A judgment or decree appealed on appeal is final and res judicata if it provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

If Judge Perry had followed the law as stated in the Fifth Circuit in *Strombeck* and had considered the opinion and findings made by Judge LaBuy without following the rejected theories, Judge Perry might then have decided [illegible]. When it comes time in the case at bar to consider whether or not the LaBuy decree resulted in cancellation to date back to 1955, or to be effective only from 1957, the presence or absence of jurisdiction may make a difference.

** The quoted [illegible]

Conflict as to Passport Act.

In the Seventh Circuit in the case at bar it was held that the Passport Act extended the power to deport. We quote from *United States* v. *Corsi*, 57 F. 2d 868, affirmed 61 F. 2nd 1043, in order to show a conflict with the Second and Eighth Circuits.

We submit that if the status of aliens who entered the United States in 1920 is to be reexamined today by virtue of the McCarran Act as if the aliens were at our gates, it becomes important that the law be settled on this conflict by this Honorable Court.

Conflict with a Decision of a District Court in Another Circuit.

In *United States* v. *Muff*, 2nd Circuit, 170 F. Supp. 182, Judge Dimock has held that the burden of showing the entry to be unlawful rests upon the deporting power. This conflicts with *Ulisidis* v. *Holland*, 3rd Circuit, 245 F. 2d 812. The Hearing Officer in the case at bar took the same view as expressed by Judge Hastie in *Ulisidis*.

Reasons for Asserting that Lehmann v. Carson, 353 U.S. 685 does not Control Here.

Two grounds were involved in *Carson*:

(a) Entry without inspection

(b) Conviction after entry

In *Barber* v. *Hoda*, 254 F. 2d 382, an alien who entered before July 1, 1924 without inspection was held to have been deportable. Judge Mathews said that the *Carson* case was not distinguishable. In a footnote Judge Mathews said:

> "As to whether appellee had any such status (non deportability) prior to December 24, 1952 we express no opinion."

We submit that in *Carson*, Your Honors did not directly express an opinion on ground (a) above. In the case at bar there are no such grounds as (a) and (b).

We quote from the brief filed on behalf of Carson in order to remind Your Honors that this Honorable Court did not deem it necessary to resolve much of the dispute between Carson and the Government. We point to differences between the issues in *Carson* and those submitted here by petitioner. In *Anselmo* v. *Hardin*, 253 F. 2d 165, Judge Kalodner said that the *Carson* and *Catalanotte* cases were inapposite, p. 172:

> "In the latter two cases there had not been a judgment prior to the deportation proceedings determining the non deportable status of the alien sought to be deported as there was in the instant case."

In the case at bar there had been a judgment about thirty years prior to the deportation proceedings, establishing that petitioner had entered legally and had become a resident. Judge Kalodner said p. 171:

> "It's (the Government's) contention that Section 241 (d) of the 1952 Act 'expressly excepts the charge of deportability for entry without inspection from the application of the 'savings clauses' in Section 405(a)' is tantamount to an assertion in the instant case that the 1952 Act has made inapplicable to deportation proceedings the doctrine of *res judicata*. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government."

So it appears that in *Carson* probably Your Honors did not choose to discuss the questions now submitted for the following reasons among others.

(a) The case at bar presents facts not present in *Carson*.

(b) If the McCarran Act is to be construed to make an alien deportable because of an illegal entry over forty years ago and about thirty years after a judgment establishing legal entry and residence, the McCarran Act is unconstitutional.

We quote from *Shomberg v. United States*, 348 U.S. 540, 546, on the meaning of the Savings Clause. The Certificate of Naturalization was taken from petitioner for something he had done, or failed to do, in his dealings with Naturalization Officials in 1928. The cancellation did not change the status he had acquired previous to the date of the execution of his Preliminary Form (App. 206). *United States v. Minnahe*, 348 U.S. 528, 535.

In the Sixth Circuit, in *United States v. Kershner*, 228 F. 2d 142, 146, it was decided that a status of nondeportability is protected by Section 405 of the McCarran Act. In the Seventh Circuit, in the case at bar, it was decided that petitioner can not avail himself of the protection contained in Section 405. We argue that it was error for the Court below to conclude that *Lehman v. Carson*, 353 U.S. 685 reversed *Kershner*, insofar as the question involved in the case at bar is concerned.

Petitioner having entered prior to July 1, 1924 cannot be deported for illegal entry.

In *Bonnadsen v. Nelson*, 2 F. 2nd 296, 298; *United States v. Smith*, 36 F. 2nd 563, with the approval of the Court of Appeals, 46 F. 2d 229, 230 and *Engel v. Zurbrick*, 51 F. 2nd 632, 633, it was held that the Passport Act affords no warrant or authority for deportation. Also see *United States v. Lehmann*, 136 F. Supp. 458. This case was reversed in *Lehmann v. United States*, 248 F. 2nd 519 on

authority of *Lehmann v. United States ex rel. Carson*, 353 U.S. 685. It is our contention that Your Honors did not expressly overrule Judge McNamee on the proposition quoted below. In the case at bar the Administrative Agency held otherwise and the court below, in effect, has held that the Passport Act is authority for deportation.

We quote from *United States v. Lehmann*, 136 F. Supp. 458, 461.

> "It would seem, therefore, that Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924 to apply for a status of permanent residence in this country. Kansas, in his work entitled 'Immigration and Nationality Act Annotated' has this to say of the effect of former Section 728 (b) and Section 1259 of Title 8 U.S.C.A.
>
> > 'However, if he (the alien) entered prior to July 1, 1924 and has not departed since, he cannot be deported for illegal entry alone. (Act of March 2, 1929, as amended August 7, 1939.) Carried over into the Act of 1952.' p. 123.
>
> See also Commentary on Immigration and Nationality Act of 1952 by Walter M. Besterman, pp. 65, 66, Vol. 1, Title 8 U.S.C.A."

If it is now to be held that *Lehmann v. Carson*, 353 U.S. 685, is authority for deportation of an alien who entered prior to July 1, 1924, without inspection, we point to the fact of inspection in the case at bar and the subsequent acquisition of lawful residence, in order to distinguish *Carson*.

Ex Post Facto.

We quote from *Lehmann v. United States*, 353 U.S. 685, the concurring opinion by Mr. Justice Black and we refer to the dissent by Mr. Justice Douglas in *Marcello v. Bonds*,

349 U.S. 302, 319. We respectfully request reconsideration of previous opinions on the subject of retrospective legislation as applied to deportation.

The Savings Clause in the McCarran Act Requires Application of the 1917 Immigration Act to Petitioner and preserves his Status thereunder.

We set out some of the history of the Savings Clause in an Appendix, herein p. 871.

By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner, Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip alien of advantages gained under prior laws." *United States* v. *Menasche*, 348 U.S. 528, 535.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause.

We submit that through the retroactive deportation provisions of the 1952 Act, aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a non-deportable status under the prior laws had such status preserved. In this way an effect will be given to all parts of the statutes.

Petitioner is not subject to deportation if his status of nondeportability was preserved under section 405(a), the 1952 Immigration and Nationality Act Savings Clause (8 U.S.C. 1101 Notes). He was not subject to deportation under legislation which was in effect prior to the 1952 Immigration and Nationality Act. In effect, the Administrative Agency, affirmed by the Courts below, has held that petitioner did not have a status under prior legislation which could be preserved by the McCarran Act. We contend that the term status in the 1952 Act savings clause encompasses and preserves petitioners nondeportability under prior legislation. In addition, the savings clause speaks of "conditions" and "rights in process of acquisition." The question is whether § 241 (d) by specific provisions prevents the continuation of the old law, preserved by the savings clause. We contend that Congress in enacting the Savings Clause did not intend to preserve only rights "in process of acquisition" and cut off rights fully acquired. *Wong Kan Sang v. Brownell*, 227 F. 2d 41.

The Orders and Judgment entered by Judge Wilkerson in 1928 are res judicata on the very issues relitigated before the Administrative Tribunals.

We tabulate the various facts shown as to petitioner, including steps taken by him to acquire citizenship. When it became a matter for the Hearing Officer to appraise the decree entered by Judge LaBuy the Hearing Officer was misguided. The Hearing Officer failed to observe that when the LaBuy decree was affirmed, the Court of Appeals interjected matter beyond its power. This interjected matter was also followed by Judge Perry. Judge Perry erroneously enlarged the jurisdiction of Judge LaBuy by holding that a former law as to jurisdiction was kept in

force by the McCarran Act. The Court of Appeals erroneously held that the LaBuy decree made null and void all that took place before Judge Wilkerson.

We quote from *Anselmo v. Hurdip*, 256 F. 2d 171, to show that the doctrine of *res judicata* is not within the control of Congress. *Lehmann v. United States*, 353 U.S. 685, is not in point because, for one thing, the alien had not obtained a judgment fixing his status.

The Court of Appeals, in the case at bar, erred in holding that the cancellation of petitioner's Certificate of Naturalization nullified anybasis for the doctrine of *res judicata*. The Court of Appeals we respectfully submit did not fully understand our contention. The Court of Appeals misses the point that Judge Wilkerson, by judgment established a status for petitioner as a resident alien who had entered legally. Judge Wilkerson exercised judicial power as conferred by the Constitution, Article III. When the Court of Appeals affirmed the denaturalization decree, 256 F. 2d 487, 491, herein p. 8[illegible], it decided that the judgment and orders entered before Judge Wilkerson were not *res judicata* of the issues presented before Judge LaBuy. Judge Petty and the Appeals Court failed to properly understand the issues decided by Judge LaBuy. Our contention is that the Wilkerson judgment precludes relitigation of the matter of entry before the Hearing Officer. We set out part of the Complaint, App. [illegible], before Judge LaBuy to show that it was charged that petitioner did not present a Certificate of Arrival. This charge was shown to be false by the Government evidence before Judge LaBuy and was there abandoned. The Complaint contains some sketchy conclusions about an assumption of a false identity at the time of arrival, but Judge LaBuy made no findings concerning entry. What little

evidence there is in the record made before the Hearing officer through the Writer. Here was one intended to show illegal entry, appeared for the first time before the Hearing officer. Judge Lathy did not undertake to vacate or modify the various papers upon which Judge Wilkerson entered judgment. If Judge Lathy had undertaken to cancel the Certificate of Naturalization on the ground alleged in the Complaint about illegal entry, that would have been illegal, entirely, not in the Complaint and not in the statute.

After Your Honors consider the appeals the legal effect of the judgment by Judge Lathy, the authorities and arguments as follows:

void the previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. Judgments, §449 p. 880.

The Court of Appeals construed the opinion of Judge LaBuy to mean p. 499, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy • • • •"

It would have been more accurate if the Court of Appeals had said

DeLucia's failure to reveal his arrest in Italy.

Judge LaBuy was interested in the record of convictions only to the extent that they showed an arrest. This failure to reveal took place eight years after entry. The determination of issues actually litigated is conclusive. *Cities Service Co. v. Securities and Exchange Comm.*, 257 F. 2d 926, 930. Now Your Honors are respectfully requested to determine if the precise fact determined had anything to do with entry.

We repeat the above quote from the Court of Appeals p. 499, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy • • • •"

A re-examination of the records, including the opinion by Judge LaBuy, must compel Your Honors now to perceive that the "failure to reveal" must mean failure to reveal to the Naturalization Examiners. When Judge LaBuy and the Court of Appeals used the plural, "homicides", they included a conviction in 1924, entered in the absence of the defendant therein named (Ex. 38, App. 229). There is no evidence that petitioner even knew of the conviction when he was naturalized.

Judge Boray in answer to our point said (App. 206):

"... he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence to support such conclusion. The "failure to reveal" can not legally be extended from failure to reveal to Examiners to "failure to reveal" to the American Consul and the inspectors at the port of entry.

The concealment or misrepresentation occurred three years after petitioner had acquired legal residence. All the investigation possible to be made after the alleged false answer was made on the Preliminary Form (App. 206) in 1928 and before the Petition for Naturalization came on for hearing (App. 212) could not have developed any fact to show that petitioner had not acquired, not only a legal residence, but a status of non-deportability. Even if an investigation developed all of the circumstances recited before the Hearing Officer and it could have been presented to Judge Wilkerson in 1928 by the Government in opposition to petitioner's application for citizenship, Judge Wilkerson may have found that petitioner had acquired residence in the United States. Judge Wilkerson may also have found, after consideration of all of the evidence now before the Administrative Agency, that petitioner was of good character and entitled to be admitted to citizenship. Petitioner must be judged by the law as it existed in 1928, not as it is today under the McCarran Act. *To what a material as in 1928 (cf. Jordan v. Tashiro*, 278 U. S. 123, 127). In 1928, a false answer as to an arrest was not material on his petition (and it was). Nor was a false answer in 1928 as to an arrest (or finally material after petitioner had acquired lawful residence and a status of non-deportability. Even if Congress had the power to take away the status petitioner (cf. Congress could not turn back the clock and make an answer material in 1952 which

was not material in 1928. It is true that the Act of 1952 changes the law, but such change does not alter fundamental principles of law. *Anselmo v. Hardin*, 253 F. 2d 165, 171.

We quote from *Anselmo v. Hardin*, 253 F. 2d 165, 168 to point up well settled principles applicable to res judicata. In a footnote Judge Kalodner quotes Mr. Justice Frankfurter in *Angel v. Bullington*, 330 U.S. 183, as follows:

> "The doctrine of res judicata reflects the refusal of law to tolerate a needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion . . . And it has gone through, *if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties*." (Emphasis supplied by Judge Kalodner).

The Court of Appeals, below, p. 819, said that the proceedings before Judge Wilkerson were not res judicata of issues presented in the denaturalization proceeding.

This brings into focus two questions:

(1) What were the issues [illegible] Judge Wilkerson?

(2) What were the issues presented [illegible]

(a) If (1) and (2) were the same, [illegible]

(b) If (1) and (2) were not identical [illegible] and (2) but not (1), and we need not decide with (2).

Before the Hearing Officer, a new problem arose. Did the doctrine of res judicata apply in consideration of the judgment entered by Judge Wilkerson as to the issues in the deportation case?

(1) What were the issues before Judge Wilkerson?

(2) What were the issues before the Hearing Officer?

(3) What was the jurisdiction granted by law to Judge Wilkerson on the matter of entry?

(4) What was the jurisdiction granted by law to Judge Lalley on the matter of entry?

(5) What was the jurisdiction granted by law to the Hearing Officer on the matter of entry?

There was no evidence upon which Judge Perry might conclude that petitioner made any material misrepresentations to the Inspector when he entered the United States. What is more important, there has been no showing anywhere that Judge Wilkerson was told or not told of any misrepresentations made by petitioner concerning entry. Our point is that the Government had an opportunity to contest the veracity of the Certificate and the records of entry, before Judge Wilkerson. Having failed to do so, it is now too late. *United States* v. *Nechman*, 183 Fed. 788; *In Re Jow Gin*, 175 F. 2d 299; *Anselmo* v. *Hardin*, 253 F. 2d 165.

Assuming for the purpose of argument that Judge LaBuy had jurisdiction to cancel the finding of Judge Wilkerson, *i.e.*, that petitioner had entered lawfully; that Judge LaBuy could have cancelled the Certificate of Arrival and could have ordered the record upon which this Certificate was based, to be expunged, Judge LaBuy did none of these things. The original judgment entered by Judge Wilkerson is left standing. There was no evidence before Judge LaBuy concerning the entry, further than that shown by the exhibits.

Before the Hearing Officer, the Government established for the first time in all of this litigation the death of Mr. Beck, the Inspector who evidently passed petitioner. The witness, Edward Ferro (App. 90) was not produced before Judge LaBuy, nor was any other witness called before Judge LaBuy to prove anything about entry. The exhibits put in evidence before Judge LaBuy and again before the Hearing Officer show a legal entry, which evidence was uncontradicted.

We call attention to the judgment entered by Judge Wilkerson and Certificate of Naturalization as a starting point from which to review the order of deportation. We respect-

fully represent that under the Law, the judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress made conditions precedent to naturalization. *Choctaw County Dist. v. Bank*, 308 U.S. 371, 378; *United States v. Throckmorton*, 98 U.S. 61; *United States v. Richmond*, 17 F. 2nd 28.

Mr. Justice Douglas in *Kramer v. United States*, 328 U.S. 654, 670, distinguished *United States v. Throckmorton*, 98 U.S. 61 and *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 421, from which the following appears:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact the establishment of naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category."

Your Honors do not have a communist case. There has been no suggestion to date that petitioner did not take the oath of allegiance in good faith. It becomes necessary to consider the extent to which the original proceedings in the Naturalization Court may constitute a final determination of issues of fact. Those facts relating to the past, to behavior and conduct.

The Courts below have ignored the fact that petitioner must have established lawful entry as an immigrant with intent to remain and that Judge Wilkerson found that he had acquired that status in 1928.

We quote from *Tutun v. United States*, 270 U.S. 568, 578:

> "The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court."

In *Re Vasicek*, 271 F. 2d 326, as illustrating the rule that the burden rests on a petitioner for naturalization affirmatively to establish that he had fully met the requirements of the statute, Judge Dwyer has gathered the authorities relating to the various steps including:

> "* * * proper proof has been made concerning his entry in the United States. * * *"

We quote from *Petition of Largo*, 21 F. 2nd 968:

> "Under the law, it seems apparent that a declaration of intention can be made legally by an alien only when he is legally a resident of the United States."

Judge Wilkerson approved of and accepted the Declaration of Intention and the petition for naturalization, and admitted petitioner to citizenship. When the Hearing Officer decided that petitioner had entered illegally, that official failed to give the required legal effect to the judgment entered by Judge Wilkerson. It appears that Judge Perry (App. 262) was under the mistaken opinion that Judge LaBuy had found the entry to have been illegal. We submit that if Judge LaBuy had cancelled because of illegal entry that would have been for illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. *United States v. Strombra*, 227 F. 2d 903. Even if Judge LaBuy did have jurisdiction of a charge of illegal procurement, no such charge is in the Complaint (App. 133).

To sum up:

(a) This deportation case and the previous denaturalization case before Judge LaBuy are two different suits between the same parties.

(b) An inquiry must be made as to whether the allegation of unlawful entry, made before Judge LaBuy was actually litigated and determined, but what might have been litigated and determined.

(c) Only upon matters actually litigated and determined is the judgment before Judge LaBuy to be regarded as an estopped as against petitioner.

We quote from *Larson* v. *Northland Trans. Co.*, 292 U.S. 20, 25:

> "The established rule in this Court is that in a second action between the same parties, a claim different from one sued upon in a prior action is presented, then the judgment in the former case is an estoppel 'only as to those matters in issue or points controverted upon which the finding or verdict was rendered.'"

The judgment entered by Judge Wilkerson might be regarded as a voidable judgment. By authority of Congress, Judge LaBuy was granted a limited jurisdiction to void a previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. JUDGMENTS §449 p. 880. We quote from *Brisco* v. *Bd. of Columbia*, 221 U.S. 547, 553:

> "There is no possible ground for upholding the present collateral attack if the order was voidable only."

We quote from *Schneiderman* v. *United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited as in a criminal proceeding, to the matters charged in its complaint.

What was involved before Judge LaBuy and there determined is to be tested by an examination of the record, including the pleadings, the evidence submitted and the respective contentions of the parties. *Otis Savage Co.* v. *Securities and Exchange Comm.*, 257 F. 2d 926, 930.

Judgments must be interpreted in the light of pleadings. *Caprato v. United States*, 217 F. 2d 783. The Government, before Judge LaBuy, could not recover upon a cause of action different than that upon which the complaint was based. *Rosenfeld v. Linn Manufacturing Corp.*, 253 F. 2d 90.

Even if we assume for the purpose of argument that the LaBuy decree could have been regarded as an estoppel before the Hearing Officer on the matter of entry the Government waived that estoppel by reopening the question before the Hearing Officer.

In its brief to the Court of Appeals on our appeal from Judge LaBuy, the Government included the following p. 3:

> "Congressional bar makes inapplicable to these proceedings the doctrine of res judicata, nor are estoppel and laches applicable to the Government in these proceedings."

Authorities were cited including *Johannessen v. United States*, 225 U.S. 227; *Manci v. United States*, 274 U.S. 45; *Luria v. United States*, 231 U.S. 9; *United States v. Ness*, 245 U.S. 319; *United States v. Ginsberg*, 243 U.S. 472; *United States v. Steed*, 2 Cir. 1945, 152 F. 2d 614, cert. den. 328 U.S. 868; *United States v. Hauck*, 2 Cir. 1946, 155 F. 2d 141; *Knauer v. United States*, 328 U.S. 654, 673; all decided before Congress changed the law as to denaturalization as appears in *United States v. Stromberg*, 227 F. 2d 903. We respectfully ask that Your Honors reconsider the authority of *Johannessen et al.* in the light of the new statute. The Government asserted that the new statute had the effect of further restricting the doctrine of res judicata. We quote p. 8:

> "Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. See,

e.g., *Hazel-Atlas Glass Co. v. United States*, 238 U.S. 9. Without distinction between intrinsic or extrinsic fraud, have the courts held this to be so."

As we understand the previous decisions *Johannessen* et al, the claim made by the defendants that the Naturalization judgment stood as a bar to Denaturalization, Your Honors rejected this claim on the ground that Naturalization had been illegally procured. Now that Congress has repealed illegal procurement as a ground, we contend that Congress has closed the gates sufficiently to put back the bar as far as the case at bar is concerned.

The Hearing Officer unlawfully placed the Burden on petitioner.

The Hearing Officer erroneously construed Section 291 as shifting the burden to petitioner to show lawful entry. The Board of Appeals approved of this erroneous construction and added that petitioner had stood mute at his peril. The Court of Appeals said, contrary to the record, that the Hearing Officer had placed the burden on the Government. All Section 291 requires is that an alien prove the time, place and manner of entry. *United States v. Murff*, 170 F. Supp. 182. Such facts were established by the exhibits in the record before petitioner was called upon to testify.

The Court of Appeals does not mention the *Murff case* or the fact that the statute has been changed. No mention is made of the fact that the Hearing Officer proceeded as if the old law were still in effect. It is contended here that the Hearing Officer made a mistake in the construction of Section 291 and consequently placed the burden on petitioner to make further proof of a lawful entry. As was said by Mr. Justice Frankfurter, concurring in *Harisiades v. Shaughnessy*, 342 U.S. 580, 597:

"Courts do enforce the requirements imposed by Congress upon officials in administrating immigration laws, e.g., *Kwock Jan Fat* v. *White*, 253 U.S. 454, and the requirement of Due Process may entail certain procedural observances. E.G. *Ng Fung Ho* v. *White*, 259 U.S. 276."

In the case at bar, the stipulated evidence demonstrated the time, place and manner of the entry in 1920 into the United States by petitioner. The burden of showing that such entry was unlawful rested upon the deporting power. From the record it appears that the Hearing Officer made a serious mistake as to the law applicable.

The Administrative Agency Acted on the Assumption that Section §291 of the McCarran Act Took from an Alien the Privilege against Self incrimination.

The Hearing Officer in his opinion said that he did not agree that petitioner had a right to the privilege but that he did not use any inference from the claim of privilege. The Hearing Officer used a presumption, erroneously based on Section 291, that failure to testify caused him to conclude that petitioner was in the United States illegally. The Immigration Officials believed that the Fifth Amendment was qualified by Section 291. The Court of Appeals has accepted the statement of the Hearing Officer *ex.*, that he drew no inference because of the claim of privilege and points to Section 291 as creating a burden. The Board of Appeals construed the Fifth Amendment in the light of Section 291 and did not disclaim any inference. The Court of Appeals had previously held in *United States* v. *DeLucia*, 256 F. 2d 489, herein p. 823 that petitioner was entitled to the privilege. It must be that the Hearing Officer believed that Section 291 gave him authority to rule contrary to the Court of Appeals.

We quote from *United States* v. *DeLucia*, 256 F. 2d 493, 495 herein p. 826, which opinion was before the Administrative Agency.

> "To us it appears clear that he was entitled to rely upon the privilege which he claimed."

In addition to the information before the Court of Appeals at the time of its decision in the above contempt case, the Hearing Officer was informed as follows: (App. 101)

> "Mr. Stewart: * * * it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under the federal laws."

Surely the Hearing Officer did not intend to overrule the Court of Appeals on the law of the case. The record, we submit demonstrates that the Hearing Officer believed that the fact that this is a deportation case made a great difference, that the McCarran Act gave him the right to treat petitioner as if he were an alien at our gates seeking admission. It must be that the Hearing Officer believed that § 291 gave him authority to rule contrary to the Court of Appeals. In the case at bar, the Court of Appeals makes no mention of *United States* v. *DeLucia*, 256 F. 2d 493, herein p. 823. Apparently the Court of Appeals has approved of the position taken by the Hearing Officer. We quote from *United States* v. *Roberson*, 235 F. 2d 517 on the rule that the Government must make out a prima facie case before shifting the burden to a defendant. This rule makes it unnecessary to discuss the effect of a possible presumption in a proper case. Petitioner was entitled to submit

his case to the Hearing Officer solely on the weakness of the Government's evidence. The Hearing Officer construed Section 291 in such manner as to require petitioner to either testify or suffer the penalty of a presumption that petitioner was an alien in the United States in violation of law.

The Administrative Tribunal failed to distinguish between a passport issued to petitioner and one issued to another and used by petitioner.

Certain datum points must be accepted as proved

(1) Petitioner had a passport,

(2) Petitioner had a visa.

The Government served a *subpoena duces tecum* on petitioner demanding the production of his passport and visa. When questioned at the hearing, petitioner swore that he had lost these documents. This opened the door to secondary evidence, but the Government elected to suppress its evidence. The Hearing Officer found, contrary to many circumstances in proof, that petitioner was not the person described in his passport.

Please note the difference between the witness and the petitioner.

Under this heading we go into detail in order to show from the record that it would have been impossible for petitioner to assume the identity of the witness.

We are able to demonstrate from the exhibits that petitioner in fact was described in his passport and that the witness Maglio was differently described in his passport.

We request attention to *United States ex rel. Fink* v. *Reimer*, 96 F. 2d 217 where Judge Hand explained the difference between the use of a passport belonging to another and a passport in fact issued to the immigrant under a name other than his own. Aliens who have passed through our

gates may be expelled only after proceedings conforming to due process of law. *Shaughnessy* v. *United States*, 345 U.S. 206, 212. The Inspector was not obliged to accept statements made by an alien as true. *Ex parte Gouthro*, 296 Fed. 509, affirmed 8 F. 2nd 1023. Petitioner relied upon the decision of the Inspector and filed his Declaration of Intention, became a legal resident and eight years after admission obtained a judgment fixing his status and renounced his allegiance to the King of Italy. Judge Perry held (App. 261) that petitioner committed a fraud on the American Consul in Italy, but there is not a scintilla of evidence to support any such finding. The Government suppressed evidence as to what transpired before the Consul.

We quote from *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, as set out in *Vannopoulos* v. *Robinson*, 247 F. 2d 655, 658:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

The rule is stated in *Zito* v. *Moatal*, 174 F. Supp. 531, 537 and authorities are collected *in re* inferences drawn by an administrative trier of fact. The test of substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences.

Judge Perry (App. 261) found that petitioner had not previously used the name Paul Maglio. This is contradicted by the record. The Hearing Officer and the Courts below ignored the legal effect of the judgment entered by Judge Wilkerson changing the name of petitioner.

We must give credit to the assumption that the Hearing Officer and the officials of the Board of Appeals knew that in 1920 violation of the Passport Act did not authorize

deportation. Their contrary decision can be understood, we submit if Your Honors determine from the record that the Administrative body construed the McCarran Act, Section 241 (a) (1) of the Immigration and Nationality Act, to express the intention of Congress to put all aliens back at our gates and to treat them as if they were just arriving. The administrative officials have failed to heed *Shaughnessy v. United States*, 345 U.S. 206, 212, where it was said that aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to due process of law.

When petitioner obtained his visa the burden was on him. The fact that he satisfied the Consul is shown by the issuance of the visa. To say now that he met that burden by some fraudulent misrepresentation is arbitrary, in the absence of any evidence as to what representations were made.

In the absence of the production of evidence in the possession of the Government, we assume that the American Consul was informed as to any trouble petitioner may have had with the authorities in Italy. If in fact petitioner was convicted of a crime in his youth, the American Consul was in a better position to determine whether or not it included moral turpitude than the Hearing Officer, guessing fifty years later and thousands of miles from the scene.

> "Failure to produce evidence within the control of a party raises the presumption that, if produced the evidence would operate against him; and every intendment will be resolved in favor of the opposite party; * * *" *Shuell v. London Amusement Co.*, 123 F. 2d 302, 306.

Also please see cases cited in 31 C.J.S., Evidence, § 156, p. 847.

The Government Suppressed Important Evidence Within the Control of its Officials.

As far as this record discloses, the Consul knew, at the time of the visa, all that has been learned since that date by all of the other departments of the government put together. It is fair to assume that Mr. Rando (App. 154) at the time of his investigation in 1957 knew of its purpose and had such information as Your Honors may now derive from the various exhibits in evidence. Mr. Rando knew that from his Declaration of Intention (App. 267) and Petition for Naturalization (App. 212) petitioner arrived on the steamship Ryndam, after embarking in France. Mr. Rando knew that petitioner passed inspection at New York and was admitted as the bearer of a passport together with a visa. Mr. Rando also knew the name on the passport and of the fact that petitioner had had this name changed by Judge Wilkerson. Not a word did Mr. Rando say as to whether petitioner had used the name Maglio in France or Italy. Surely Mr. Rando must have inquired. One of the first things Mr. Rando did, no doubt, was to inquire about the passport and the visa. The fact that he did not tell Judge LaBuy what was learned by him and the fact that he did not produce any papers or records concerning the passport and the visa issued to petitioner, must compel any fair minded person to conclude that the passport and the visa were found by him to have been regularly issued. Mr. Rando obtained copies of birth and death certificates, marriage records and various papers purporting to show a criminal record. Now we know from the various documents put in evidence that Mr. Rando must have known, in view of the pendency of a denaturalization suit, that the passport and visa might be drawn into question.

Is it not fair to assume that Mr. Rando inquired of the American personnel and inspected the records, to de-

termine how much the Consul knew about the personal history of petitioner and whether or not that official had been deceived? Of course we know that that must have been one of the first things Mr. Rando inquired into. Yet we do not find a word in his testimony concerning such matters.

Is it not fair to conclude that if petitioner had misrepresented anything or sworn falsely before the American Consul that the Government would have proven the fact? In the absence of this evidence, petitioner should have been afforded a presumption which has been ignored to date, although often requested below.

We assume that when Mr. Freedman prepared the subpoena (Ex. 59 A, App. 277) he expected to be required to prove, either by direct evidence, or by secondary evidence, just what travel documents were used at the time of entry. The situation was altered when the burden had been improperly shifted to petitioner at the hearing.

When petitioner signed his name to his Petition for Naturalization, we know from the evidence that the Naturalization Examiner knew that he had used two names. When petitioner applied for his visa we do not know anything about the names used because the evidence was suppressed. When petitioner applied for entry, we do not know what the Inspector knew about names used because of the absence of evidence on the subject.

The Hearing Officer Considered Matters Not Introduced in Evidence in the Absence of Proof.

We quote from *Yiannopoulos v. Robinson*, 247 F. 2d 655, 657:

> "Rather, it is the overall denial of justice which impels our conclusion. Suffice it to say, that, without the admission of this evidence, it is, at least, highly un-

certain whether the finding of the Special Inquiry Officer would have been made. It is on this basis that we conclude that the hearing was unfair." This line of thought finds support in the language of the Supreme Court in *Bridges* v. *Wixon*, 326 U.S. 135, 156, "In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong * * * or by showing that incompetent evidence was admitted and considered * * * *But the case is different where evidence was improperly received and where but for the evidence it is highly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing* * * *." p. 658) (Emphasis supplied by Judge Lindley)

We carry our argument a step further and contend that the evidence improperly received was insufficient to stop up the gap left in the evidence by the Government at the close of the case before the Hearing Officer. The improper evidence took the Hearing Officer off on the wrong track. We might have prevented this if the improper evidence had been introduced in our presence.

The Hearing Officer and the Courts below failed to notice the variance between

(a) Voluntary homicide and

(b) Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

One should not assume that (a) and (b) are alike. One would have to gain some knowledge of Italian law in order to understand (b). We have no such crime in the United States. There had been no proof of the law of Italy. In our absence, after the hearing closed, the Hearing Officer attached to his opinion an appendix purporting to be part of an Italian code. He based an argument on this code

to the effect that (a) is a crime involving moral turpitude. An administrative body cannot take notice of a foreign law. *United States* v. *District Director of Immigration*, 106 F. 2d 14. The Court of Appeals said that our point could be avoided on the ground that standards in use in the United States could be applied. We contend that if the conviction had been for murder or larceny, or some crime known here, that might be true, but the conviction was for (b) which leaves the matter in confusion.

The statute, 8 U.S.C.A.—1252 (b) provides that:

> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government.

The Hearing Officer said (App. 122):

> "The pertinent statutory provision relating to voluntary homicide is Article 364 of the Italian Penal Code, which was in existence in Italy at the time of the offense in 1915 and the conviction in 1917."

Nowhere in the record can be found any evidence to show that this was the pertinent statute, or that it was in existence at the time of the offense or conviction. The record, including the evidence taken in our absence, does not purport to show that the five codes constituted all of the law of Italy on the subject.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this:

> (a) I find a definition of a crime in the statute.
>
> (b) I believe that the definition is intended to cover crimes in which there had been moral turpitude.

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition.

Ex. 37 (App. 227) shows:

"Title of Crime—Attempted Homicide"

This should have warned the Hearing Officer that the word "Homicide" may not mean manslaughter. In this country there is no such crime as assault with intent to commit manslaughter. *People* v. *Moore*, 146 Ill. 600. The term "Attempted Homicide" would be meaningless without more evidence as to the law and the indictment.

Your Honors know that in the United States our laws provide for killing without criminal intent, *e.g.*, as in self defense or in defense of habitation, or as in killing by misadventure. In the absence of proper proof as to the nature of the crime, the Hearing Officer was left to speculate that a crime involving moral turpitude had been involved. Your Honors know that in this country a crime might originally be a serious one as to the charge and reduced in turpitude by a court after the evidence has been heard. See footnote No. 14 to *Ablett* v. *Brownell*, 240 F. 2d 625, 631 for Section 4 of the Act of September 3, 1954, 68 Stat. 1145-1146, 8 U.S.C.A. § 1182 (a), concerning crimes in which the punishment was reduced. See also *Calvillo* v. *Robinson*, 271 F. 2d 249, 250. See footnote 341 U.S. 236, for opinion of Attorney General on moral turpitude. The record made before the Hearing Officer left all such matters as to the law and the practice of Italy to speculation.

Reference is made in Ex. 38 (App. 231) to the acquittal of one defendant in a previous trial. Without the indictment in evidence as to any of these cases, the Hearing Officer was left to speculate on the legal effect in Italy of this acquittal.

One may kill intentionally under the law in this country without moral turpitude. We do not know about the law of Italy because the Government failed to prove that law, or to make any attempt in our presence. The Court of Appeals said, herein p. 849:

> "It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term 'voluntary' indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The fact that the sentence was for 2 years, 6 months and 16 days and a pecuniary penalty of 145 lire (App. 225) should have put the Hearing Officer on notice that probably the Italian Officials were dealing with a crime which did not include moral turpitude. From Ex. 39 (App. 234, 237, 238) we observe that a defendant to have "partial mental defect" and another declared to be "partially unbalanced mentally at the time" were given reduced sentences because of this condition. This should have warned the Hearing Officer to not rely on inferences to be drawn from records showing a practice different from ours. Here a sentence was imposed on one defendant in his absence, but that sentence was void under our standards. If one negates the possibility of a killing being justifiable that does not negate a killing being without moral turpitude, as for instance, a killing under compulsion of another. We repeat from the above quote from the Court of Appeals

> "* * * the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The killing could not be justifiable, yet it could lack moral turpitude. The entry of a sentence in Italy does not have the same legal significance as it would a sentence in the United States. An inspection of Ex. 36, 37, 38 and 39 will show many sentences unknown to our law.

So we present this confusing picture, Judge LaBuy and the Hearing Officer inquired into the circumstances in order to identify petitioner as to the person named in the various documents. Then after the Hearing Officer makes his inquiry, consults the documents and holds that the papers from their content show a crime of moral turpitude, we seek to point to further circumstances to show lack of premeditation, extenuating circumstances and absence of moral turpitude, then we are told by Judge Perry that the Hearing Officer should not have looked at the contents of the various exhibits. We are told by the Court of Appeals that it was not necessary for the Hearing Officer to look. The Hearing Officer looked until he found support for his adverse conclusions then when we look at the same material in order to point to the lack of evidence from which to find the fact of conviction of petitioner of a crime involving moral turpitude, we are denied the right to look at the circumstances on which the Administrative officials founded the order of deportation. Petitioner asserts that if the Government had proved voluntary homicide as charged in the deportation rule and the law of Italy designated voluntary homicide as a crime including moral turpitude, that would be one thing; but when the record of conviction shows something different than voluntary homicide, as we know it, the very terms of the conviction demonstrates lack of moral turpitude.

Ex. 37 (App. 277), purports to be a prison record. No law was produced to show that such record is required, or where the information was obtained. It is fair to assume that any prison record would also show the date of discharge of the prisoner. This portion was suppressed by the Government. If this prisoner was in fact petitioner, he may have left prison and have gone to France before the date of the conviction on May 18, 1917 in Ex. 20 (App.

224). No prison record or any other evidence was produced to show that the person convicted in Ex. 36 ever entered any prison. This gives rise to the view that if all of the records had been produced, they would show that the defendant named in Ex. 36 was not in Naples on May 18, 1917, the day of sentence.

When Judge LaBuy decided that petitioner had not truthfully answered a question about an arrest, all Judge LaBuy was required to look for in the various exhibits was evidence that petitioner had in fact been arrested in Italy. It was not necessary for Judge LaBuy to find that petitioner had been convicted. On the other hand, it was necessary for the Hearing Officer to find that petitioner had been convicted. The evidence heretofore considered by Judge LaBuy was deficient to prove conviction. The Hearing Officer endeavored to put it up this deficiency by resort to evidence taken in our absence and failed to fill the gaps in proof. The lack of similarity of the law of Italy and the law of the United States is shown by Ex. 38. (App. 229)

We adopt the dissent in *Jordan v. DeGeorge*, 341 U.S. 223, 232, as our argument to the effect that the phrase "crime involving moral turpitude" lacks definite standards, hence the statute is unconstitutional for vagueness.

There was no proper evidence to identify petitioner as the person named in Ex. 36 (App. 224). *People v. Casey*, 396 Ill. 374, 378.

Motion Pursuant to Rule 60 (b).

Petitioner filed a motion for leave to file a petition in the District Court, herein p. 865. Suggestions were attached, herein p. 865. The Government made answer, herein p. 868. The Court denied the motion, herein p. 871, without opinion. An argument in favor of petitioner is

to be found in *Polites* v. *United States*, 365 U.S. 426, including the dissenting opinion. The change or clarification of the law accomplished since the decree is to be found in a number of cases, including *Jaimes* v. *United States*, 366 U.S. 223.

In *United States* v. *Profaci*, 274 F. 2nd 289, it was held that in proceeding to set aside naturalization decree on ground that defendant had fraudulently concealed a foreign arrest in naturalization proceedings, proof of the actual state of defendant's mind had to establish strong inferences of falsification if citizenship was to be revoked, and where contents of questions to which false answer assertedly was given was not reasonably free from ambiguity, clear understanding thereof and intent to deceive were not readily to be implied merely from false answer.

It is suggested that petitioner should be given an opportunity to show that the decree should be set aside. In such event the deportation order should fall. In view of the fact that the Hearing Officer and the Courts below have followed dictum rendered by Judge LaBuy and the District Court Opinion is ambiguous, petitioner should be afforded the right to a clear statement of the facts and the law from the District Court.

C.
ARGUMENT.

Conflict in Construction of the McCarran Act as to Status Acquired by Petitioner.

There is a conflict between *United States ex rel Zacharis* v. *Shaughnessy*, 221 F. 2d 578, decided in the Second Circuit and the case at bar in the Seventh District. The *Zacharis* case construed the McCarran Act, §405(a), 8 U.S.C.A. §1101 note, to give an alien a "status condition, or right in process of acquisition" as to which statutes repealed by the McCarran Act were continued in force by saving clause. In the case at bar, the Court of Appeals held that the savings clause did not apply, although petitioner had taken steps to become a citizen under prior law and long before the enactment of the McCarran Act. We quote from the opinion by Judge Clark in *Zacharis*, 221 F. 2d 578, 580, after citing *Shomberg* v. *United States*, 348 U.S. 540 and *United States* v. *Menasche*, 348 U.S. 528:

> "The Court's willingness to recognize inchoate rights, expressed also in its disapproval of the majority decision of this court in *United States ex rel Abo-astam* v. *Carr*, 2 Cir., 147 F. 2d 342, and approval of the contrary decision in *Bertoldi* v. *McGrath*, 86 U.S. App. D.C. 1, 178 F. 2d 977, strongly suggests that here the earlier law must be given effect. * * *" (581). We conclude that the preliminary application for the visa in September, 1952, was sufficient to bring Zacharis within §405(a). This application was the first step in his effort to attain a legal status in this country".

Conflict as to Doctrine of Res Judicata.

In the Third Circuit, in *Anselmo* v. *Hardin*, 253 F. 2d 165, it was held that the doctrine of res judicata applied where an alien had previously secured a judgment fixing his sta-

tus in a deportation proceeding. In the Seventh Circuit in the case at bar, the Court of Appeals has refused to apply such doctrine.

Conflict as to Jurisdiction in re Denaturalization.

Judge Perry, affirmed by the Court of Appeals, held that (App. 257), herein p. 838?

> "This court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952."

Judge Rives in the Fifth Circuit in *United States v. Stromberg*, 227 F. 2d 903, 907 said:

> "We hold, therefore, that, after the effective date of the McCarran Act as to actions not then pending, illegal procurement was not continued as a ground for denaturalization."

In the Seventh Circuit in *United States v. DeLucca*, 250 F. 2d 487, 491, the Court of Appeals interjected illegal procurement as a ground for denaturalization, this interjection was quoted by Judge Perry in the case below as follows (App. 257), herein p. 838:

> "* * * We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally* and *fraudulently* procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry.)

It is important that the law be settled by Your Honors. If the law is to be held as correctly stated in the Fifth Circuit in *Stromberg* and the Court of Appeals in the Seventh Circuit is wrong a prejudicial error has been committed. If illegal procurement was not continued by Congress, Judge LaBuy had no jurisdiction to decide the questions

thought by Judge Perry to have been decided. Also the interjection of illegal procurement by the Court of Appeals was an interjection of a matter beyond the jurisdiction of Judge LaBuy. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529, and *Pair v. United States*, 363 U.S. 370, 388, should have reminded the courts below that findings and theories should not enter any case for the first time on appeal. Judge Perry in quoting the portion interjected by the Court of Appeals erred in not applying the rule stated in 50 C.J.S. Judgments §§622, 624 pp. 36-50:

> "A judgment affirmed on appeal is final and res judicata provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

If Judge Perry had followed the law as stated in the Fifth Circuit in *Stromberg* and had considered the opinion and findings made by Judge LaBuy without following the interjected matter, Judge Perry might then have decided to discharge petitioner.

By interjecting illegal and fraudulent procurement into the decree entered by Judge LaBuy, the Court of Appeals could possibly justify its erroneous view, later expressed in the case at bar, herein post, that the LaBuy decree made the entire proceedings void. When it comes time in the case at bar to consider whether or not the LaBuy decree resulted in cancellation to date back to 1928 or to be effective only from 1957, the presence or absence of jurisdiction over illegal procurement may make a difference.

Judge Goodman said in *United States v. Reclassified*, 181 F. Supp. 75, 78:

> "Ever since 1906 when the Congress first provided by statute for denaturalization on the ground of 'fraud' or on the ground that the certificate of naturalization was 'illegally procured', 34 Stat. 596, 601, the

> Courts have wrestled with the interpretation of the term 'illegally procured.' A variety of meanings have been ascribed to it by the lower federal courts. The United States Supreme Court has applied the terms in specific factual situations, but has never provided a general definition."

We respectfully submit that the case at bar points up the need to explain, clarify and distinguish the cases with which the Courts have wrestled. In *United States* v. *Minker*, 250 F. 2nd 721, 730, Judge Finnegan said that there is a delusive exactness about the words "*concealment*" and "*material fact*."

Conflict as to Passport Act.

In *United States* v. *Corsi*, 57 F. 2d 868, affirmed 61 F. 2d 1043, in the Second Circuit, the alien contended that the statute did not extend the power to deport. Judge Coleman said, p. 869:

> "This contention is directly contrary to the decision of the Court of Appeals of the Eighth Circuit in *Delaney* v. *Moore*, 28 F. 2nd 185, [illegible] finds some support in the Seventh Circuit *United States ex rel Ochera* v. *Smith* (D.C.) 26 F. 2nd 563, reversed on another ground (C.C.A.) 46 F. 2nd 220 and in the Third Circuit *United States ex rel Chin* v. *Weeks* (D.C.) 24 F. 2d 707) but it seems contrary to the general tenor of the decisions in our own circuit. *Goldsmith* v. *United States*, 42 F. 2d 132; *United States ex Petrizio et Alfro, ex rel Graber* v. *Kaxiath*, 30 F. 2nd 242; *United States ex rel Lazarus* v. *Watkins* (D.C.) 278 Fed. 518; *United States ex rel London* v. *Phelps*, 22 F. 2nd 288. The weight of authority is on the side of reason in this case and the writ must be dismissed."

We submit that if the status of aliens who entered the United States in 1920 is to be reexamined today by virtue of the McCarran Act as if the aliens were at our gates, it becomes important that the law be settled on this point by this Honorable Court.

Conflict with a Decision of a District Court in Another Circuit

In *United States v. Marff*, 2nd Circuit, 175 F. Supp. 182, Judge Dimock has held that the burden of showing the [illegible] rests upon the deporting power. This conflicts with *Uhrdes v. Holland*, 2nd Circuit, 245 F. 2d 812. The Hearing Officer in the case at bar took the same view as expressed by Judge Hastie in *Uhrdes*. We again quote from Jurisdiction of the Supreme Court of the United States by Wolfson and Kurland, § 326 and refer to the cases there cited:

> "Cases are by no means wanting where certiorari has been granted upon a showing, *inter alia*, that the decision sought to be reviewed is in conflict with that of a District Court or Court of Appeals of other circuits. It would only be misleading, however, to suggest that in these cases the writ issued because of that conflict. In each, other considerations shown by the opinion must be taken into consideration in order to arrive at a true estimate of the reasons for granting the writ. In many instances the conflict appears to be an insignificant factor. In other instances, where the District Court decision relied upon is well reasoned and has been approved by a number of a similar character, its worth as a precedent can undoubtedly be weighed heavily in considering the reason that the decision sought to be reviewed is erroneous and should be reversed in the interest of the law and justice. It is one factor with the weight of authority."

Reasons for Asserting that Lehmann v. Carson, 353 U.S. 685 does not control here

Two grounds were involved in *Carson*:

(a) Entry without inspection

(b) Conviction after entry

In *Barber* v. *Hong*, 254 F. 2d 382, an alien who entered before July 1, 1924, without inspection, was held to have been deportable. Judge Mathews said that the *Carson* case was not distinguishable. In a footnote Judge Mathews said:

> "As to whether appellee had any such status [not deportability] prior to December 24, 1952 we express no opinion."

We submit that in *Carson* Your Honors need not directly express an opinion on grounds (a) above. In the case at bar there are no such grounds as (a) and (b).

We have examined the brief submitted by attorneys for Carson and conclude that many questions were raised which Your Honors did not undertake to decide. The Attorneys for Carson furnished the result of research in support of the following, p. 12:

The 1952 Savings Clause, the Broadest ever enacted by Congress, requires application of the 1917 Immigration Act to Respondent and Preserves his status thereunder.

As a reminder that Your Honors left much of the dispute between the parties undecided, we quote from the Carson brief, p. 13:

> "Petitioner's [Government's] brief, however, puts solely for the first time to claim that respondent [Carson] did not have a status under prior immigration legislation which could be preserved by the 1952 Immigration Act (Brief p. 24, 435, Brief p. 19, No. 72). Petitioner states that 'mere nonaction' of Congress does not grant an 'affirmative privilege' or status (Brief, No. 72, p. 20) that 'in the absence of some affirmative action by Congress extending to such aliens a privilege of this nature, the savings clause has no application' (Brief, No. 435, p. 26), and finally that peti-

> ...tioner applied no vested right to escape deportation.

It appears that the Attorneys for Carson had a difficult time for the reason that the Government took the position that Carson had failed to appeal to preserve his status. In Appendix [illegible] we quote further from the brief submitted to Your Honors on behalf of Carson.

In the absence of anything to be found in the opinion in *Johnson v. Carson* touching on whether or not some affirmative action on the part of the alien would have made any difference, we respectfully submit that Your Honors have left open questions raised in the case at bar. We again quote from the decisions of the Supreme Court of the United States by Wolfson and Kurland, p. 341 and refer to the cases cited:

> "The Supreme Court at its opinions occasionally will reserve expressly or refuse to decide questions of law urged by counsel or suggested by the issues. When certiorari is applied for in a subsequent case, which appears to involve the question thus reserved, the reservation in the earlier Supreme Court opinion may properly be urged among the grounds why the writ should issue. The Court, that, [illegible] on a question in one case, [illegible] has been required to resolve such questions which it could not or would not decide in the earlier case."

Also see footnote in *Sinclair v. United States*, 279 U.S. 263, 299, where Mr. Justice Clark said:

> "This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under §241 (a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings. Whether the question of deportability could be raised in a naturalization pro-

ceeding was expressly waived by the petitioner. See Petitioner's Brief, p. 7."

We quote from Mr. Justice Whittaker, 353 U.S. 685, 690:

"It seems to us indisputable; therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved."

In the companion case *Maldonado v. Catalanotte*, 353 U.S. 602, 604, where the alien was convicted of a law relating to narcotics, Mr. Justice Whittaker said:

"It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. The case is, therefore, 'otherwise specifically provided' for within the meaning of § 405(a)."

We are led to believe that in both cases Your Honors paid particular attention to the convictions in this country. No such ground is involved in the case at bar.

We again quote from the *Carson* brief, p. 13:

"Finally, we submit that the real issue here is not one of statute, but rather one as to which law governs, the old or the new, and whether section 241 (d) by specific provisions prevents the continuation of the old laws protected by the savings clause. Proper analysis of this issue initially directs attention to the Congressional History of the savings clause."

In the case at bar it does not matter whether the old or new law be used as a guide, insofar as the final result is concerned. Under the old law, petitioner was not deportable. If the new law is to be understood that Congress intended to have it apply to petitioner, the new law is then unconstitutional, as being in disregard of the doctrine of *res judicata*.

In *Ankeboi vs Hardin*, 253 F. 2d 165, Judge Kalodner said that the *Carson* and *Catalanotte* cases were inapposite, p. 172:

> "In the latter two cases there had not been a judgment prior to the deportation proceedings determining the non-deportable status of the alien sought to be deported as there was in the instant case."

In the case at bar there had been a judgment about thirty years prior to the deportation proceedings, establishing that petitioner had entered legally and had become a resident. Judge Kalodner said, p. 171:

> "Its (the Government's) contention that Section 241 (d) of the 1952 Act 'expressly excepts the charge of deportability for entry without inspection from the application of the "savings clauses" in Section 405(a)' is tantamount to an assertion in the instant case that the 1952 Act has made inapplicable to deportation proceedings the doctrine of *res judicata*. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government."

So it appears that in *Carson* probably Your Honors did not choose to discuss the questions now submitted for the following reasons among others:

(a) The case at bar presents facts not present in Carson.

(b) If the McCarran Act is to be construed to make an alien deportable because of an illegal entry, over forty years ago and about thirty years after a judgment establishing legal entry and residence, the McCarran Act is unconstitutional.

Mr. Justice Clark said in *Shomberg* v. *United States*, 348 U.S. 540, 546:

> "If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the new Act *affects* petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exception. Only where something in the new law introduces a change, thereby affecting one's status under the old law, is the savings clause called into play. Only then is a specific exception to §405 required."

In the case at bar, the grounds for deportation are not the same under the prior law as those found to exist by the Hearing Officer under the McCarran Act. Whether or not the savings clause is brought into play is but one of many questions here submitted. It is a question as to whether or not Congress by the new law intended to introduce a change in the status acquired by petitioner. As to Shomberg Your Honors said, p. 542:

> "Petitioner was eligible for citizenship under the prior law and remains eligible under the new Act. But under the prior law petitioner was not deportable."

The same can be said of petitioner in the case at bar. As was said of Menasche in *United States* v. *Menasche*, 348 U.S. 528, 530:

> "Accordingly, all other prerequisites to citizenship having been satisfied, respondent was entitled to be naturalized under the Nationality Act of 1940 upon completing five years of residence. 54 Stat. 1142, 8 U.S.C. (1946 ed.) §707."

Petitioner was entitled to be naturalized under the Act in force in 1928 insofar as legal entry and lawful residence

are concerned. The Certificate of Naturalization granted to him was taken from him by something he had done or failed to do in his dealings with the Naturalization Officials. The cancellation did not change the status he had acquired as to residence previous to the date of executing his Preliminary Form on February 2, 1928 (App. 296). Mr. Justice Clark said in *Menasche*, p. 535:

> "If Congress was willing to preserve a 'mere condition, unattended by any affirmative action,' we think its savings clause also reaches instances, such as this, where affirmative action is present. The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress . . .
>
> (538) "The few decisions considering this problem under the 1952 Act accord with the decisions of the District Court of Appeals in the instant case, holding that §405(a) preserves rights accruing in the pre-petition stages of the naturalization process. *United States v. Primak*, 242 F. 2d 878, affirming 122 F. Supp. 90; *In re Jacson*, 117 F. Supp. 528. We believe that Congress so intended."

The need to explain, clarify or distinguish Lehmann v. Carson, 353 U.S. 685.

We quote from an opinion by Judge Stewart in *United States* v. *Kershner*, 228 F. 2nd 142, 146:

> (3) "We conclude that Carson's status of nondeportability is protected by section 405 of the Act, since the statutory provisions upon which appellee relies do not constitute such specific exceptions to section 405 as are contemplated in that section in order to make it inapplicable."

In the case at bar the Court of Appeals said, herein p. 85a:

> "Respondent cannot avail himself of the protection contained in the savings provisions of Section 405(a). This section provides among other things that prior statutes and statuses shall be continued in force and effect '. . . unless otherwise specifically provided herein . . .' The Supreme Court in *Lehmann* v. *Carson* (353 U.S. 685) held that Section 241 (a) (1) of the 1952 Act does 'otherwise specifically provide' for the deportation of any alien who at the time of entry was excludable by the law existing at that time, and that Section 241(d) makes 241(a) applicable to all aliens 'notwithstanding (1) that any such alien entered the United States prior to 1952 or (2) that the facts by reason of which any such alien belongs to an excluded class occurred prior to 1952'. The Court concluded that it was 'undisputable therefore that Congress was legislating retrospectively, as it may do . . .'"

Whether or not the conflict which exists between *Kershner* in the Sixth Circuit and the case at bar in the Seventh Circuit has been settled by *Lehmann* v. *Carson*, 353 U.S.

ex depends upon what Your Honors intended to settle by *Carson*. Carson came to the United States without inspection and had done nothing to attain a status of nondeportability. The Courts below in the case at bar failed to note the effect of these distinguishing features.

Our reading of *Carson* leads us to contend that Carson was finally ordered deported because of his two convictions. When two grounds are alleged for deportation, the Government need sustain only one. After one ground was sustained by Your Honors, which ground did not involve illegal entry, this Honorable Court apparently did not deem it necessary to express a view as to whether or not Carson had attained a status because of the failure of the Government to proceed within five years on the stowaway charge. Mr. Justice Whittaker said, p. 690:

> "It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. This case is, therefore, 'otherwise specifically provided' for within the meaning of §405 (a). The Court of Appeals was in error in holding to the contrary, and its judgment is *Reversed*."

The headnote is as follows:

> "(a) The saving clause in §405 (a) of the 1952 Act is inapplicable where 'otherwise specifically provided,' and §241 contains provisions which specifically provide otherwise with respect to the circumstances involved in this case."

Of course the circumstances in the case at bar are different. Petitioner was not a stowaway. The order to show cause (App. 8) does not include a charge of two convictions. We believe that our understanding of the import of the opinion rendered by Mr. Justice Whittaker is con-

firmed by the concurring opinion by Mr. Justice Black, from which we quote, p. 690, 691:

> "I agree with the Court that §241 of the Immigration and Nationality Act of 1952, 8 U.S.C. §1251, makes aliens deportable for past offenses which when committed were not grounds for deportation * * * Both respondents are ordered deported for offenses they committed long ago—one in 1925 and the other in 1936. Long before the 1952 Act reached back to deportation as one of the legal consequences of their offenses both paid the price society then exacted for their misconduct."

Carson entered the United States in 1919, so Mr. Justice Black was clearly considering events which took place after entry and so understood Mr. Justice Whittaker.

In *Lehmann v. United States*, 248 F. 2d 519, we respectfully submit, that the Court of Appeals failed to see the point we make and failed to correctly understand the case as decided by Judge McNamee, *United States ex rel. Scivia v. Lehmann*, 136 F. Supp. 458, from which we quote:

> "His criminal record furnishes no ground for deportation. His expulsion from this country is sought and was ordered solely upon the grounds alleged in the Warrant of Deportation, which are:
> That the petitioner is subject to deportation under "Sec. 241 (a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, a stowaway, under Sec. 3 of the Act of Feb. 5, 1917 and a person who had not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918 and the Executive Order in effect at the time of entry."

Please keep in mind the following which we again quote from *Schneiderman v. United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding but neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

If Judge McNamee has stated the case correctly, the two convictions were out of the *Scarpa* case. Yet the Court of Appeals based its decision on the two convictions. We quote, 248 F. 2d 519:

> "He has been twice convicted and sentenced to penal servitude for two offenses violating, respectively, the law of West Virginia relating to unlawful liquor traffic and the law of Ohio covering blackmail. In a careful opinion, United States District Judge McNamee gave well-considered reasons for his action in granting the petitioner's application for writ of habeas corpus.
>
> In behalf of the government, the appropriate Officer in Charge, United States Immigration and Naturalization Service, has appealed from the district court's order; and the United States Attorney for the Northern District of Ohio has prosecuted this appeal.
>
> Since the opinion of the United States District Judge was written, the Supreme Court *(Lehmann v. United States ex rel. Carson*, 353 U.S. 685), has decided the issues here involved against the contention of the petitioner appellee and contrary to the decisions of the district court. The Supreme Court held that the savings clause, section 405, of the 1952 Immigration and Nationality Act, 8 U.S.C.A. §1101 note, does not preclude deportation under section 241 (a) (4) and (b), 8 U.S.C.A. §1251(a) (4), (b) of an alien who has entered this country in 1919 as a stowaway and who had received a conditional pardon for one of two convictions in 1936, the alien not having been deportable until the 1952 Act became effective. The *Carson case* is not distinguishable from the case at bar."

We quote from JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES by Wolfson and Kurland §371 and refer to the cases there cited:

> "While the Courts of Appeals often concede conflict with, and refuse to follow, courts of equal or lesser rank in the other circuits, they recognize, of course, the binding force of Supreme Court adjudications. Nevertheless, cases are frequent enough where through oversight or inadvertence or misunderstanding, the court below has failed to apply or has erroneously applied an applicable decision of the Supreme Court. * * * For in exercising its discretion upon the writ, the Supreme Court is not concerned so much with error as with elimination of uncertainty and confusion in the application of federal law. And in many cases the Court has granted the writ in order to explain, clarify or distinguish its prior decisions."

In the case at bar petitioner had acquired two anchors before the date of the McCarran Act

(a) a lawful permanent alien resident,

(b) a valid Declaration of Intention on file.

As to the effect of (a) alone, see *Petition for Naturalization of Medalion*, 173 F. Supp. 249; *Petition for Naturalization of Zaharia*, 166 F. Supp. 314. As to the effect of (b) see, *Petition for Naturalization of Rosenbaum*, 171 F. Supp. 141; *In re Naturalization of Wolff*, 270 F. 2nd 422.

Petitioner having entered prior to July 1, 1924 cannot be deported for illegal entry.

In *Bonnedsen v. Nelson*, 2 F. 2nd 296, 298; *United States v. Smith*, 36 F. 2d 503, with the approval of the Court of Appeals, 46 F. 2d 229, 230 and *Engel v. Zurbrick*, 51 F. 2d 632, 633, it was held that the Passport Act affords no warrant or authority for deportation. Also see *United States v. Lehmann*, 136 F. Supp. 458. In the case at bar the Administrative Agency held otherwise and the court below.

in effect, has held that the Passport Act is authority for deportation. If Your Honors accept our view the Court of Appeals in 248 F. 2d 519 did not reject the argument made by Judge McNamee concerning the Passport Act. We quote from 136 F. Supp. p. 461:

> "The provisions of former Section 728(b) were probably designed primarily for the benefit of aliens who lawfully entered this country prior to July 1, 1924 and of whose admission there was no available record. However, under the broad designation of 'any alien' whose entry was before that date the section was applicable as well to aliens who entered the United States unlawfully but who were in all other respects qualified to apply for the benefits of the section. See *Linklater* v. *Perkins*, 64 App. D.C. 69, 74 F. 2d 473. Section 728(b) was reenacted in the Act of 1952 where it appears as Section 1259. There are a few slight changes in phraseology and arrangement of the text in the new section, but in scope and effect it is identical with former Section 728(b). It would seem, therefore, that Congress has adhered consistently to a policy of permitting aliens who unlawfully entered the United States prior to July 1, 1924 to apply for a status of permanent residence in this country. Kansas, in his work entitled 'Immigration and Nationality Act, Annotated,' has this to say of the effect of former Section 728(b) and Section 1259 of Title 8 U.S.C.A.:
>
> > 'However, if he (the alien) entered prior to July 1, 1924 and has not departed since, he cannot be deported for illegal entry alone. (Act of March 2, 1929, as amended, August 7, 1939.) Carried over into the Act of 1952.' P. 123.
>
> See also Commentary on Immigration and Nationality Act of 1952 by Walter M. Besterman, pp. 65, 66, Vol. 1, Title 8 U.S.C.A."

We quote further from the same book by Kansas, p. 125 in commenting on the authorities:

> "Here again the date of July 1, 1924, controls as to deportation for illegal entry. * * * The July 1, 1924, date protects him so long as he remains on United States territory. * * * In deportation proceedings for unlawful entry there is no time limit for deportation if entry was made subsequent to July 1, 1924. *Philippides* v. *Day*, 283 U.S. 48; *U. S. ex rel. Fink* v. *Reimer*, 96 F. 2d 217, affirming 16 F. Supp. 487; *Bhagat Singh* v. *McGrath*, 104 F. 2d 122)."

If it now be held that *Lehmann* v. *Carson*, 353 U.S. 685, is authority for deportation of an alien who entered prior to July 1, 1924, without inspection, we point to the fact of inspection in the case at bar and the subsequent acquisition of lawful residence in order to distinguish *Carson*.

Here again we submit that Your Honors should grant certiorari in order to eliminate uncertainty and confusion in the application of federal law and to explain, clarify and distinguish prior decisions.

Ex Post Facto.

Judge Perry, affirmed by the Court of Appeals, said (App. 258), herein p. 834:

> "Petitioner contends that §241 of the Immigration and Nationality Act of 1952 (8 U.S.C. §1251) constitutes retrospective legislation, not within congressional power because of Article I, §9 of the Constitution which provides that 'No bill of attainder or *ex post facto* law shall be passed.'"

and after quoting from a number of cases Judge Perry said (App. 259), herein p. 837:

> "In spite of the decisive language of the Supreme Court, this court overrules petitioner's contention that §241 of the Immigration and Nationality Act of 1952 is unconstitutional as an *ex post facto* measure."

Mr. Justice Black said, concurring in *Lehmann v. Carson*, 353 U.S. 685, 690:

"The Court goes on to hold, however, that such retrospective legislation is a valid exercise of congressional power, despite Art. I, § 9, of the Constitution providing that 'No Bill of Attainder or *ex post facto* Law shall be passed.' Past decisions cited by the Court support this holding on the premise that the *ex post facto* clause only forbids 'penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment.' *Harisiades v. Shaughnessy*, 342 U.S. 580, 594. I think this definition confines the clause too narrowly. As Mr. Justice Douglas pointed out in his dissenting opinion in *Marcello v. Bonds*, 349 U.S. 302, 319, another line of decisions by this Court has refused to limit the protection of the clause to criminal cases and criminal punishments as those terms were defined in earlier times. *Fletcher v. Peck*, 6 Cranch 87, 138, 139; *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. And see *United States v. Lovett*, 328 U.S. 303, 315, 316.

"What is being done to these respondents seems to me to be the precise evil the *ex post facto* clause was designed to prevent."

Please see also the dissenting opinion by Mr. Justice Douglas in *Marcello v. Bonds*, 349 U.S. 302, 319.

We respectfully request reconsideration of the subject of retroactive legislation as applied to deportation.

The Savings Clause in the McCarran Act Requires Application of the 1917 Immigration Act to Petitioner and preserves his Status Thereunder.

The Hearing Officer said: (App. 121)

"The respondent was excludable at the time of his entry under the laws then existing. The Immigration

and Nationality Act makes deportable any alien who was excludable under the law existing at the time of entry, regardless of when the entry took place (Sections 241(a)(1) and 14(c) and 21 is concluded that the respondent is subject to deportation on the first charge set forth in the order to show cause."

The Board of Appeals said (App. 131):

"(a) that the respondent's last entry into the United States was unlawful in that he, an alien, violated the Passport Act of May 22, 1918 and the Executive Order in effect at that time;"

The Hearing Officer said (App. 124):

"* * * the proof presented by the Government has established that the respondent's entry on that date was unlawful and that he was excludable because he did not present a valid passport, and for the further reason that he had been convicted of a crime involving moral turpitude."

The Board of Appeals said (App. 132):

"(b) that the respondent escapee alien who was excludable by law existing on April 16, 1920 on account of that he has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry, to wit voluntary homicide (Section 241(a)(1), Immigration and Nationality Act, supra; Section 3, Act of February 5, 1917, 8 USC 136; 1940 Ed.)."

Judge Perry said (App. 250; hereinafter 8 USC 1101, note):

"Petitioner claims that he cannot be deported because he has acquired a status which is protected by the savings clause of the 1952 Act (8 USC 1101, note)."

This claim was denied by Judge Perry, after quoting from *Lehmann* v. *Carson*, 353 U.S. 685 (App. 250).

The Court of Appeals also cited *Lehmann v. Carson*, 353 U.S. 685 and said, [herein p. 8]:

> "Respondent cannot avail himself of the protection contained in the savings provision of section 405(a)."

Judge Perry said [App. 25a-], herein p. 8[29]:

> "The deportation proceeding under review was brought on the grounds that under the above quoted Section 241(a)(1) petitioner at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry in two respects:
>
> (1) No passport;
>
> (2) Conviction before entry.

In effect, the Administrative Agency, affirmed by the Courts below, has held that petitioner did not have a status under prior legislation which could be preserved by the Act of 1952. There has been omitted from consideration:

(1) Petitioner entered before July 1, 1924 and cannot be deported for illegal entry since there has been an inspection.

(2) Although petitioner might have been excluded in 1920, he could not be deported for illegal entry after 1925.

(3) The judgment entered by Judge Wilkerson to the effect that petitioner had entered legally.

We contend that the term status in the 1952 Act savings clause encompasses and preserves petitioner's non-deportability under prior legislation. In addition, the savings clause speaks of "conditions" and "rights in process of acquisition." The question is whether § 241(a)(1), by specific provisions was intended by Congress to prevent the continuation of the old law, preserved by the savings clause.

We contend that Congress in enacting the Savings Clause did not intend to preserve only rights "in process of acquisition" and cut off rights fully acquired. *Hoon Kwa Sung v. Brownell*, 227 F. 2d 44.

It will be noted that in *United States v. Shaughnessy*, 221 F. 2nd 538, not only that the preliminary application for a visa gave the alien a status, but that the application for visa was eventually denied. The decision made by Judge Clark did not turn on the right of the alien to a visa. The approval of the application by the local immigration officials was enough to give the alien a status. We quote, p. 580:

> "We turn then to the general question of the applicability of 8 U.S.C. (1101 (21) (27) to Zacharias. Did the filing of the petition for issuance of an immigration visa by his American wife give Zacharias 'any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing,' at the time the 1952 Act went into effect? If so, under (403 (a) of that legislation, 8 U.S.C. (1101 note, his case must be governed by prior statutes unless otherwise specifically provided."

History of the Savings Clause

We have placed this history in an Appendix, beginning p. 571.

Please see dissent by Judge Goodrich in *United States v. Smith*, 62 F. 2nd 508, 515, for legislative intent in eliminating the following "ism" proposed in Congress as a ground for deportation:

> "... or obtains entry into the United States by wilfully false or misleading representation or the wilful concealment of a material fact."

The Orders and Judgment entered by Judge Wilkerson in 1928 are res judicata on the very issues relitigated before the Administrative Tribunals.

Some of the pertinent facts may be tabulated as follows:

(1) Petitioner was born in Italy and owed allegiance to the King of Italy.

(2) Sometime, date not shown, petitioner secured a passport from the Italian Government.

(3) Sometime, some place, date and place not shown, petitioner obtained a visa from an American Consul.

(4) Sometime, date not shown, petitioner went from Italy to France.

(5) On August 1, 1920, petitioner sailed from Boulogne, France on the S.S. Ryndam (App. 268).

(6) On August 12, 1920 petitioner arrived at the Port of New York, passed inspection and was admitted for permanent residence.

(7) Sometime after arrival, time and place not shown, the Immigration Officials put the required information about petitioner in a Register, not produced or accounted for. Sometime after arrival the officials, on their own motion, prepared a Certificate of Arrival and sent it to the field office in Chicago, to be used in the event that petitioner filed a Declaration of Intention (App. 174).

(8) After arrival, petitioner took up residence in the United States as a duly admitted alien.

(9) On January 9, 1925, petitioner filed his Declaration of Intention (App. 267) in the Circuit Court of Cook County, Illinois.

(10) On February 21, 1928, petitioner prepared his Preliminary Form for Petition for Naturalization (App. 206) received by the Service in Chicago, Illinois on March 14, 1928.

(11) Sometime after the receipt of this Preliminary Form by the Chicago office, the Preliminary Form was sent to the port where arrival was claimed. The port would verify the arrival. (App. 140).

(12) On April 10, 1928, Examiner Durisch (App. 139) at the office of the Service in Chicago, put petitioner and his witnesses under oath and examined them. It was the usual practice to take the assertions in the Preliminary Form and to question the applicant as to the various items of fact alleged that were needed for the Petition for Naturalization. (App. 141). The Examiner, Mr. Durisch did not remember petitioner or the incident. He identified his handwriting on the Face Brief. (App. 206) The Examiner with the help of a Clerk, prepared the Petition for Naturalization (App. 212).

(13) On April 10, 1928, petitioner's Petition for Naturalization (App. 212) was filed in the District Court.

(14) On April 10, 1928, petitioner appeared before Mr. McKay, a Designated Examiner. Mr. McKay had died before the trial. The Face Brief (App. 206) indicates that Mr. McKay recommended that the Petition be granted. There was no effort made to prove what took place in the way of an examination of petitioner by Mr. McKay, although one of the witnesses who made an affidavit attached to the Petition for Naturalization was called by the Government (App. 138).

(15) Designated Examiner Jordan (App. 167) did not remember petitioner or the particular proceedings, but he identified his notes on the Face Brief (App. 205) and said he accompanied petitioner to court.

(16) On September 27, 1928 Judge Wilkerson entered an order (App. 219), herein p. 863, reciting that upon consideration of the Petition, affidavits and further testimony taken in open Court, admitted petitioner to become a citizen. Ordered also that petitioner's name of Paul Maglio be changed to Paul DeLucia. The Certificate (App. 217) recites that petitioner was then a resident of Chicago, Illinois, and that he had in all respects complied with the Naturalization Laws and was entitled to be admitted. The order recites that petitioner had taken the oath required by law.

(17) In 1956, a Complaint was filed in No. 12003 from which we quote (App. 137):

> "12. That good cause exists for the institution of a suit under Section 340 (a) of the Immigration and Nationality Act, 8 U.S.C. 1451 (a), to set aside and cancel the naturalization * * * on the ground that it was procured by concealment of material facts and by willful misrepresentations."

(18) On June 11, 1957, after a hearing, before Judge LaBuy, the District Court entered a decree, from which we quote (App. 244):

> "* * * the order * * * admitting the respondent * * * to citizenship be and is hereby revoked, set aside and made void, * * * that the Certificate of Naturalization of respondent * * * be and the same is hereby cancelled;"

(19) In an appeal from the above decree petitioner pointed out that (as in *United States v. Strombera*, 227 F. 2d 903, 905):

> "The Nationality Act of 1940 was superseded on December 24, 1952 by the McCarran Act. * * * Section 338 (a) of the Act of 1940 had provided that the order admitting a person to citizenship might be revoked and set aside and the certificate of naturalization cancelled *'on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.'* Section 340 (a) of the McCarran Act changed the grounds to read: *'on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation'.*"

Judge LaBuy in his opinion, herein p. 801, left some doubt as to what the Judge had in mind as ground for cancellation.

We contended if Judge LaBuy cancelled because of lack of the essential prerequisite of legal residence, or on the ground that petitioner had made a false answer about arrests in his Preliminary Petition, that would constitute illegal procurement. That Judge Wilkerson settled those matters. The Court of Appeals said in affirming Judge LaBuy, 256 F. 2d 487, herein p. 819:

> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and *fraudulently* procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied to *fraudulently*.)

In holding that the order of naturalization was illegally procured, the Court of Appeals attributed to Judge LaBuy

a jurisdiction removed by Congress. The word *tribunals* interjected by the Court of Appeals still leaves the ground as one of illegal procurement. It was not within the jurisdiction of the Court of Appeals to make this interjection. *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529; *Johnson v. United States*, 256 F. 2d 849; *Parr v. United States*, 363 U.S. 370, 388.

The interjection of fraud is not supported by the record, especially if the record be viewed in the light of *James v. United States*, 366 U.S. 223. This is one ground for our motion under Rule 60 (b).

(20) When we made the point about the change in the law as to illegal procurement before Judge Perry, instead of rejecting that said by the Court of Appeals as an interjection, said, (App. 257) herein p. 838:

> "In this connection it should be observed that in the opinion of the Court of Appeals in the denaturalization case (256 F. 2d 487), Judge Schnackenberg said, at page 491:
>
> > "We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied by Judge Perry).

Judge Perry disregarded the following which we copy from 5 C.J.S. Attorneys, § 613, p. 39, § 624, p. 50. Among the cases cited are *In re Paquet*, 115 F. 2nd 69; *H. Abraham & Son v. Casola*, 178 U.S. 210; *Kilbreth v. Metropolitan Life Ins. Co.*, 119 F. 2nd 497.

"In order to render a judgment a bar, it is also essential that it be so far specific and definite and free from ambiguity or contradictions as to show clearly what was the claim or cause of action adjudicated . . . nor is the scope of the estoppel to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration . . . A judgment affirmed on appeal is final and *res judicata* provided the judgment is of such nature that it would have been final and *res judicata* in the absence of an appeal."

(21) On our appeal from Judge Perry in the case at bar, it was said herein p. 851:

> "The judgment entered in the denaturalization proceeding cancelling respondent's certificate of citizenship nullifies any basis upon which the doctrine of *res judicata* can apply."

We contend that the judgment entered before Judge Watkinson is still in full force and effect as to the finding of legal entry and acquisition of lawful residence.

(22) The Government in its brief, before the Court of Appeals in the case at bar said, p. 16:

> "Moreover, the essential facts in support of the Government's deportation order made below may be upheld before this Court under the doctrine of collateral estoppel. The essential facts sustaining deportation have heretofore been determined in the denaturalization proceeding."

It is not true that the facts supporting the Hearing Officer were determined by Judge Inch. The matter of entry was not litigated before Judge Inch.

(23) This brings us to the question which we now argue.

(a) Does the doctrine of *res judicata* apply in the deportation case because of the Watkinson judgment?

(b) Does the LaBuy doctrine operate as an estoppel in the deportation case?

We note from the cases cited in DIGEST OF THE SUPREME COURT by Wolfson and Kurland-3 310 p. 588, that certiorari is not granted to review evidence, to discuss specific facts, or to give the party defeated in the court below another hearing. With this in mind we still find that considerable detail is necessary in order that necessary points be adequately presented. We trust that Your Honors will agree that the facts must be fully understood and that we have not been influenced too much by our conviction that this record demonstrates that the Tribunals below have failed to comprehend the significance of the points involved.

In the case at bar, we repeat, the Court of Appeals said, herein p. 851:

"The petitioner objected to the denaturalization proceedings on the ground that his certificate of citizenship was issued on the basis of the doctrine of [illegible] can apply.

[illegible]

thing done by petitioner, as if it made void all of the papers filed before Judge Wilkerson and had erased all that found by Judge Wilkerson. We fear that the Court of Appeals had not fully understood our point. If petitioner only had a Certificate of Arrival that would be a different case, but petitioner had pointed to the order entered by Judge Wilkerson establishing his status as a resident alien who had entered legally.

The Court of Appeals said, herein p. 56, that our contention was:

> "that Judge LaBuy made no finding in the denaturalization proceeding that the certificate (of arrival) was improperly obtained; and that, accordingly the admission proceeding pertaining to the certificate stands as a bar to the present deportation. In other words, respondent contends that this constitutes *res judicata* of lawful entry . . . Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally."

We did not rely upon "admission proceedings". We had pointed to the judgment entered by Judge Wilkerson. The Court of Appeals had no way of knowing, from the record, that the records did not reflect the true facts. The Government never introduced the record on which the Certificate of Arrival was based. For Statute which requires keeping of a Register, the Act of March 3, 1903, c. 1012, § 3, 32 Stat. 1213, 8 U.S.C. (1946 Supp.) 203, 902, amending Act of June 29, 1906, c. 3592, § 34, 34 Stat. 596, 8 U.S.C. (1940 ed.) 220, see *Ex parte Hoshiko*, 270 Fed. 324, 325.

We do have the testimony of Examiner Dixson who said that it was the custom for the officials to send the Preliminary Form to the port where arrival was claimed

and upon the basis of the information in the preliminary Form, the court would make an effort to verify the arrival (App. 140). In an appendix, hereto in part, we have copied the regulations in re a Declaration of Intention, the Preliminary Form and Proof of Residence.

Although the Preliminary Form for Petition for Naturalization (App. 206) does not contain an express plea[illegible] that the Immigration Authorities issue a Certificate of Arrival, anyone reading the testimony of the Examiners Duris (App. 139) and Jordan (App. 167) must know that the officials regarded the Preliminary Form as an application for the privilege of attaching a Certificate of Arrival to a Petition for Naturalization. All of the questions asked in writing of petitioner as to time, place and manner of entry were answered truthfully. The Examiners did not remember petitioner and did not undertake to recall all of the questions asked or the oral answers given. In the absence of evidence to the contrary, should it not be assumed that before delivering the Certificate of Arrival, the officials were in possession of all of the material facts?

In 1925, when the officials decided to allow petitioner to make use of the Certificate of Arrival, they can be charged with the knowledge that we all can now obtain from the various exhibits. They knew the facts reflected on the Certificate of Arrival, herein (p. 56). There has been nothing shown since to contradict those facts. Whether or not petitioner had been arrested in Italy had nothing to do with the fact that he had arrived at the place, time and manner shown on the Certificate of Arrival.

As was said by Judge Goodman in *Corpi v. Bonnicelli*, 147 F. Supp. 517:

> "But in a case of this kind [cancellation of certificate of naturalization as a nullity], a court can not turn back the clock

and wipe out all that was done on the strength of the certificate before it was cancelled."

The question at issue in *Cope* was different than that in the case at bar. But the *Cope* case should remind us that a decree of cancellation does not always make void the legal effect of all of the status once enjoyed.

A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights and questions of law or fact put in issue and adjudicated therein, when the same come again into controversy between the same parties. *Heaman v. Caldwell*, 286 U.S. 494 (1932); *Continental Oil Co. v. Jones*, 170 F. 2d 539 (10th Cir. 1948); *Oklahoma v. Texas Co.*, 156 F. 2d 496 (10th Cir. 1946); *Van Sandt v. Robinson*, 136 F. Supp. 554, 555 (S.D. Cal. 1955); *Restatement, Judgments* § 147 (1942); 30 Am. Jur., Judgments § 283 (1940).

It is well settled that under the doctrine of *res adjudicata* a judgment on the merits in a prior suit bars a second suit between the same parties on the same cause of action, and that under the doctrine of collateral estoppel by judgment there is precluded relitigation of issues actually litigated and determined in a prior suit, regardless as whether it was based on the same cause of action as the second suit. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

In its brief p. 2, the Government took the following position:

> "Appellant's argument of *res adjudicata* and estoppel are purely specious. Determination by immigration officers or even a Board of Special Inquiry are not *res adjudicata*. They do not preclude deportation pro-

readings at the entry is subsequently found to have been unlawful."

Your Honors will perceive that the Government created a man of straw. We did not rely on the determination by the immigration officers at all. This could be disregarded as mere lawyer talk except that the Hearing Officer and the courts below have failed to understand our point. Statements such as the above may have contributed to the confusion.

We quote from *Leonardo v. Haff*, 259 F. 2nd 166, 171, 172:

> "It is the Government's contention that Section 241 (a) of the 1952 Act expressly excepts the charge of deportability for entry without inspection from the application of the 'savings clause' in Section 405(a) as tantamount to an exception in the instant case that the 1952 Act has not been applicable to deportation proceedings the institution of which was [illegible]. We cannot subscribe to such a contention. If we did we would be compelled to consider the constitutionality of the provisions of the 1952 Act relied on by the Government, the cases cited by the Government are, supposedly [illegible] *See, e.g., Lehmann v. Brownell*, 353 U. S. 685, and *Mahler v. Eby*, 264 U. S. 32. [illegible] *We do not have to reach these difficult questions* [illegible] [emphasis supplied]

In the case at bar there had been a stipulation before Judge Wilkerson, long prior to these deportation proceedings, determining the [illegible] The Court of Appeals was in error in holding that when Judge LaBuy cancelled the Certificate of Naturalization, Judge LaBuy nullified all that had been judicially determined by Judge Wilkerson. It was within the power of

The Court of Appeals has in effect decided contrary to the decision in [illegible] that the judgment entered in the Naturalization case is not res judicata on the subject of entry.

In [illegible] v. [illegible], 263 F. 2nd 166, the Court reversed in a case wherein the District Court (190 F. Supp. 293) dismissed the action of an alien complaining of a deportation order. The question presented was whether the destruction of [illegible] should stop. When Appellant filed his Declaration of Intention he included details as to his arrival here from Italy. There being no record of his entry, an investigation took place, culminating in a deportation order. Appellant secured his discharge in a habeas corpus proceeding. Then a second deportation order was secured. It was held that the second order could not be sustained, because the Government had lost the first case. The fact of entry, as charged by Appellant, had been previously determined. The District Court erred in deciding that the judgment against the habeas corpus did not operate as res judicata with respect to the second order of deportation. In answer to a contention made by the Government that the 1952 Act gave the right to deport, no matter without inspection, Judge Kalodner said, at 171:

> "[illegible] contention rests upon a section of the instant case that the 1952 Act has made [illegible] deportable [illegible] proceedings [illegible] we cannot subscribe to such a construction."

In the case at bar, the previous judgment was entered in the Naturalization proceedings. Attorneys for appellant in *Lagonessa v. United States*, 220 F. Supp. 225, presented the authorities regarding the effect of a decree of naturalization. The legal effect of such a judgment is considered by Judge Wolfenden in *United States*

v. *Laberge*, 189 Fed. 137. In acting upon the petition of petitioner for naturalization in the case at bar, Judge Wilkerson exercised the judicial power conferred by Article III of the Constitution. *Tutun* v. *United States*, 270 U.S. 568; *Schneiderman* v. *United States*, 320 U.S. 118, 123. Petitioner in his first papers gave the facts, as he claimed them to exist, concerning his entry. The Immigration officials, according to the testimony of Darasch (App. 139) and Jordan (App. 167), verified these facts and approved.

The Naturalization Court entered judgment based upon the testimony heard in open court (App. 219), herein p. 863 and also based upon the Declaration of Intention (App. 207) (App. 212) and the Petition for Naturalization which had attached thereto a Certificate of Arrival (App. 212), herein p. 863. It is reasonable to conclude that at the time of decision, Judge Wilkerson knew that the Naturalization Examiners had investigated and had verified the sworn statements made by petitioner, including his statements as to time, place and manner of entry and the fact that he had been a legal resident for eight years. Even if the Designated Examiner had objected to the finding of legal entry and had asserted that petitioner was not a legal resident, Judge Wilkerson had the power to find the findings shown by the record. The Government had a right to appeal, which right was not exercised. The Hearing Officer and the Courts below have failed to observe that the Government has had its day in court on the matter of entry. We must look to the record to determine the questions essential to the decision of the former controversy. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 459. The doctrine of collateral estoppel applies to matters necessarily decided in the former judgment, even if there is no specific finding on reference thereto. *Cromwell* v. *United States*, 354 U.S. 208, 220.

We quote further from *Anselmo v. Hardin* 253 F. 2d 165, 168:

"With the respect to the issue of res judicata these well settled principles are applicable:

(1) A final judgment by a court of competent jurisdiction is *res judicata* as to the parties not only as to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented, but were not.

(2) Specifically, '*no question of fact or of law distinctly put in issue and directly determined* . . .' cannot afterwards be disputed between the same parties.' *Frank v. Mangum*, 1915, 237 U.S. 309, and where '. . . *the question of priority in time* and right . . . *was directly presented by* the pleadings and evidence and *distinctly dealt with and resolved* in the (prior) opinion' the decree entered pursuant to such opinion is *res judicata* as to the litigated issue. *State of Wyoming v. State of Colorado*, 1923, 286 U.S. 494, 507." (Emphasis supplied by Judge Kalodner.)

(3) The circumstances that the final judgment on the issue raised was premised on the failure of the losing party to support its position by sufficient evidence does not impair the binding effect of the judgment rendered. *Heiser v. Woodruff*, 1946, 327 U.S. 726, 735."

In a footnote Judge Kalodner quotes Mr. Justice Frankfurter in *Lawlor v. Loewe*, 235 U.S. 522, as follows:

"The doctrine of *res judicata* reflects the refusal of law to tolerate a needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties." (Emphasis supplied.)

The Court of Appeals, herein p. 819, said that the proceedings before Judge Wilkerson were not *res judicata* "*of issues presented in the denaturalization proceeding.*".

This brings into focus two questions:

(1) What were the issues presented to Judge Wilkerson?

(2) What were the issues presented to Judge LaBuy?

(a) If (1) and (2) were the same as to time, place and manner of entry, (1) must be accepted as *res judicata*.

(b) If (1) involved time, place and manner of entry and (2) did not, (1) controls and we need not bother with (2).

Before the Hearing Officer, a new problem arose. Did the doctrine of *res judicata* apply in consideration of the judgment entered by Judge Wilkerson as to the issues in the deportation case?

(3) What were the issues before Judge Wilkerson?

(4) What were the issues before the Hearing Officer?

(c) (3) and (4) are the same, so (3) controls under the doctrine of *res judicata*.

In order to properly answer these questions there must be solved three more.

(5) What was the jurisdiction granted by law to Judge Wilkerson on the matter of entry?

(6) What was the jurisdiction granted by law to Judge LaBuy on the matter of entry?

(7) What was the jurisdiction granted by law to the Hearing Officer on the matter of entry?

Your Honors will find that in the Courts below, the legal effect of (5) has been ignored. As to (6), Judge Perry,

was of the erroneous opinion that Judge LaBuy, with the interjection made by the Court of Appeals, had decided on the matter of entry. As to (6), we contend that when Congress changed the law and took illegal procurement as a ground away from the District Court, Congress cancelled any jurisdiction Judge LaBuy might have had under the previous law on the matter of entry. Judge Perry expressed the opinion, herein p. 838, that the McCarran Act saved jurisdiction on illegal procurement. This constituted serious error. *United States v. Stromberg*, 227 F. 2nd 903.

We contend that Judge Perry made errors and that the Court of Appeals fell into the same error. At times the error is more evident in the opinion rendered by Judge Perry. One illustration follows:

We quote from Judge Perry (App. 261) herein p. 842:

> "The Certificate of Arrival in this case was based on data taken from the aforesaid registry, which data, in turn, was based on *misrepresentations willfully made by petitioner to immigration authorities when he entered this country.* Certainly there cannot be attributed to such a certificate a sanctity which was lacking in the records on which it was based.
>
> "It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed, *particularly in view of the findings made by Judge LaBuy in the denaturalization case.*" (Italics supplied)

Here Judge Perry makes the mistake of concluding that petitioner relied upon his Certificate of Arrival as a bar to his deportation. Judge Perry ignored the legal effect of the judgment entered by Judge Wilkerson.

There was no evidence of misrepresentations made to immigration authorities when he entered. The records upon which the Certificate was based were not produced. In-

sofar as the Certificate does reflect the records, the records and the Certificate state the truth. There was no lack of veracity in the records on which the Certificate of Arrival was based. The Certificate of Arrival (App. I, Vol. II, f2093) has been set out in an appendix, hereto, p. 8[illegible].

The exhibits introduced show that this information was correctly stated. When Judge Perry concluded that we had placed reliance entirely upon the Certificate of Arrival, the District Judge misapprehended our point. We quote from our Petition for Review: (App. 10)

> "Judge LaBuy made no finding based upon the charge in the complaint that the Certificate of Arrival was improperly obtained. There was not a line of evidence to show any representation, true, or false, made by petitioner to the officials who did issue the Certificate. . . ."

Your Honors should find that the part of the judgment of the Naturalization Court to the effect that steps necessary as to procedure had been taken should stand undisturbed by the decree entered by Judge LaBuy. Although the Government did not produce the Register, or any records upon which the Certificate of Arrival was based, the Court of Appeals said, herein p. 851:

> "Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally."

In this one sentence we find two serious errors.

(1) We did not seek to use the Certificate of Arrival separate from the Wilkerson judgment.

(2) The records upon which the Certificate of Arrival was based were not all produced. The exhibits on

respond with the Certificate of Arrival which appears to reflect the true facts."

Here the Court of Appeals falls into the same error made by Judge Perry, as to the evidence, or lack of evidence, before the Hearing Officer. The Government did not produce the records on which the officials acted when they furnished a Certificate of Arrival. As we have pointed out, we did not seek to use the Certificate of Arrival alone to preclude deportation. Our contention is that the judgment entered by Judge Wilkerson precludes litigation again on the matter of entry before the Hearing Officer.

Under the established practice it was not necessary for petitioner to make any representation, true or false, to the Examiners or anyone else, in order to secure a Certificate of Arrival. We quote from the testimony of Mr. Jordan (App. 174):

"Q. When you refer to a Certificate of Arrival, where would that form be created? When would that first originate?

A. At that particular time I believe those certificates of arrival were procured before the Declaration of Intention was filed and were kept in the office with the Naturalization Service in the District field headquarters."

We quote from the testimony of Mr. Dorsch (App. 140):

"The applicant would show his application, which was at that time on a form number 2214, accompanied by the Declaration of Intention, which was quite commonly known as a first paper.

I personally or the applicant by our office, the application was sent to the port where arrival was claimed, and upon the basis of the information in the petition the port would make an effort to verify arrival.

> Upon verifying an arrival, a Certificate of Arrival would be issued and returned with the office papers to the Chicago office.
>
> Then upon receipt of the Certificate of Arrival, the petitioner was called to appear with witnesses at a time and a day and hour was set. When he appeared in our office the examiner would call him."

There was no evidence upon which Judge Perry might conclude that petitioner made any material misrepresentations to the Inspector when he entered the United States. What is more important, there has been no showing anywhere that Judge Wilkerson was told or not told of any misrepresentations made by petitioner concerning entry. Our point is that the Government had an opportunity to contest the veracity of the Certificate and the records of entry, before Judge Wilkerson. Having failed to do so, it is now too late. *United States v. Nechamcus*, 183 Fed. 788; *In Re Jon Gip*, 175 F. 2d 200. *Jacobucci v. Harden*, 253 F. 2d 165.

It should be kept in mind that when Judge Wilkerson considered the evidence to determine if petitioner had acquired a lawful residence, Judge Wilkerson knew that petitioner had been in this country over five years, after having passed inspection at the Port of New York.

It was held in *In Re Pon*, 206 Fed. 4, that the certificate need not be based upon any particular record. We quote:

> "* * * they ought not to be bound to say * * * that while the certificate is genuine and speaks the truth, the Court ought not to give any weight to it because the official did not have proper proof before him."

We quote from one of the cases cited by Judge Kalodner in *Anselmo*, 253 F. 2d 165, 172, *see United States ex rel. Marino v. Shaw*, 76 Fed. 2d 505, 506:

> "She cannot again be lawfully interrogated and held upon the same facts that were in issue in the former proceedings (citations). In the present proceedings it is true it is alleged that the adjudication of the court in Oregon was obtained by the introduction of false testimony, and is tainted with fraud. But such fraud is not a ground upon which to collaterally attack the judgment. *U. S. ex rel. Marino v. Shaw*, 98 U.S. 61."

In the case at bar there was no evidence intended to show that the adjudication by Judge Wilkerson as to entry, the Certificate of Arrival the Declaration of Intention and legal residency was obtained by the introduction of false testimony. All of these had been established before the making of any alleged false answer on the Preliminary Form.

The theory of the Government before Judge LaBuy was that the false answer in the Preliminary form deceived the Examiners and because of such misrepresentation the Government was prevented the Naturalization Petition to go through without contest on the matter of his arrival in Italy. There was no evidence as to the testimony heard by Judge Wilkerson. So there could be no basis for any claim that the Wilkerson judgment was obtained by the introduction of false testimony. There was no evidence to show whether or not the Government was misled by the Petition for Naturalization. Whether or not the Government was misled is now immaterial. The important thing is that the Government was afforded an opportunity to [illegible]

The statute, 8 U.S.C. 1451 authorized Judge LaBuy to set aside the order admitting petitioner to citizenship and Your Honors will perceive the Decree Nisi [illegible] cancelled the Certificate.

The complaint before Judge Dalton included the following (App. 15a—

[illegible]

Your Honors will note that the above [illegible]

[illegible]

The complaint before Judge Dalton [illegible] was made by petitioner in the instant [illegible] App. 20a).

Your Honors will note from petitioner's [illegible] plaint followed the statute [illegible] legal procedure. [illegible]

"... there was not attached to his petition for naturalization a certificate of arrival ..."

the Government proved the opposite and abandoned this charge. As to the allegation that petitioner did

"... hide from the immigration officers at the time of his arrival—"

the Government introduced no evidence and abandoned the charge. We quote from *Yates* v. *United States*, 354 U.S. 298, 335:

"'We agree further that the non existence of a fact may be established by a judgment no less than its existence, that a party may be precluded under the doctrine of collateral estoppel from attempting a second time to prove a fact that he sought unsuccessfully to prove in a prior action. *Sealfon* v. *United States*, 332 U.S. 575.'"

If the above two charges had been proved, or if the opinion of Judge LaBuy can be construed to be a finding that these charges were proved, Judge LaBuy exceeded his jurisdiction. The Hearing Officer and the Courts below should have disregarded all that said by Judge LaBuy as to entry. Judge LaBuy said nothing about any Certificate of Arrival. As to the allegation that petitioner did

"... hide ... from the Naturalization Court ..."

the record made before Judge Wilkerson was before Judge LaBuy. It shows [illegible] that Judge Wilkerson took testimony in open court. That testimony has not been preserved, no attempt was made by the Government to prove what evidence was heard. As a legal proposition, the Government was obliged before Judge Wilkerson to prove that which it claims now to show illegal entry or to suffer judgment in the absence of such evidence. The

Government can not be heard at this late day to say that petitioner did hide something from Judge Wilkerson. It is unlawful to impeach that record collaterally on the matter of entry and residence.

Assuming for the purpose of argument that Judge LaBuy had jurisdiction to cancel the finding of Judge Wilkerson, *i.e.*, that petitioner had entered lawfully, that Judge LaBuy could have cancelled the Certificate of Arrival and could have ordered the record upon which this Certificate was based, to be expunged, Judge LaBuy did none of these things. The original judgment entered by Judge Wilkerson is left standing. There was no evidence before Judge LaBuy concerning the entry, further than that shown by the exhibits. Insofar as the exhibits touch upon the time, place and manner of entry, everything had been done to accomplish a routine regular entry after due inspection as required by law.

Before the Hearing Officer, the Government established for the first time in all of this litigation the death of Mr. Beck, the Inspector who evidently passed petitioner. The witness Edward Ferro (App. 90) was not produced before Judge LaBuy, nor was any other witness called to prove anything about entry. The exhibits put in evidence before Judge LaBuy and again before the Hearing Officer, show a legal entry, which evidence was uncontradicted.

In *United States v. Ross*, 171 F.Supp. 651, the Government sought to cancel a citizenship grant. The question considered was the materiality of a false presentation to the American Consul in order to obtain a visa. But, we ask, how can any such question arise to be answered in the case at bar in the absence of evidence of what took place before the American Consul? Evidence still in the possession of the Government? See also *In Re Faibik Petition*, 159 F.Supp. 144. In *Vergette Torres v. Hoy*, 262 F. 2nd 289, the same question was answered in favor of deportation.

but please note that the Government proved the answers given by the alien to questions put to her in her application for a visa. Further there was proof that these answers were false. In *Calvillo* v. *Robinson*, 271 F. 2nd 249, the question of materiality was answered in favor of the alien. Please note again that the Government proved and it was conceded that the application for a visa had contained wilful misrepresentation of a fact. Please note that in *Duran-Garcia* v. *Neelly*, 246 F. 2nd 287, the alien admitted the commission of perjury in obtaining her visa. Again in *Herrera-Roca* v. *Barber*, 150 F.Supp. 492, the Government proved the questions and answers as they took place before the American Consul. In *United States* v. *Morris*, 27 F.Supp. 153, the alien made a false statement as to former residence to the American Consul in order to secure his visa. In *Landon* v. *Clarke*, 239 F. 2nd 631, the alien admitted the making of false statements to the American Consul in order to obtain a visa. The Court pointed to specific provisions of the McCarran Act to warrant her deportation. 8 U.S.C.A. § 1251(a)(1), 1182(a)(20). In *Lenghammer* v. *Hamilton*, 295 F. 2nd 642 the alien admitted the making of false answers in order to obtain a visa. Judge LaBuy did not choose to base the decree on illegal entry. Our point is that the Government did have to put the entry into issue by the complaint (¶ 3(b), App. 135) before Judge LaBuy and then elected to not follow up with any further evidence than that shown and which disclosed a legal entry.

We repeat from a quotation above taken from the opinion rendered by Judge Perry (App. 202) herein, p. 8:

> "It is the view of this Court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed. [Emphasis in text of the Judge as made by Judge LaBuy in the deportation case.]" (Italics Supplied)

It would be more accurate to say that we contend that the Hearing Officer failed to heed the legal effect of the judgment and findings made by Judge Wilkerson, concerning the entry of petitioner.

Judge Perry did not choose to be more specific as to the findings believed by Judge Perry to have been made by Judge LaBuy. We fear that Judge Perry misapprehended those findings and concluded that Judge LaBuy had decided that the entry was unlawful. Judge LaBuy did not base his decree on any such finding. We quote from the opinion of Judge LaBuy, 163 F. Supp. 36, 41; herein p. 812:

> "The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him."

Judge LaBuy had just made it clear that reference was made to a failure on the part of petitioner to disclose to the Examiners all the facts in the matter of a previous arrest. The question litigated before Judge LaBuy was whether or not petitioner had failed to fully and truthfully answer the questions put to him by Pursell (App. 139) Jordan (App. 167) and McKay, checking on the Preliminary Form (App. 206) requesting information about a previous arrest. There was no evidence before Judge LaBuy concerning entry, other than that shown in the various exhibits. The question as to whether petitioner concealed or misrepresented any fact to the Inspector at the time of entry was not litigated before Judge LaBuy. Judge LaBuy did say, 163 F. Supp. 36, 40; herein p. 812, that the use of an assumed name to gain entry had been held to be sufficient for revocation.

This was dictum. The cases cited by Judge LaBuy at this point do not contradict the legal principles contended for here by petitioner. Your Honors will observe that this about entry was said by Judge LaBuy in passing, in the statement of the case.

Mr. Justice Sanford said in *Oklahoma* v. *Texas*, 272 U.S. 21, 52:

> "The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but on an examination of the issues made and intended to be submitted, and which it was intended to decide."

See also *Vicksburg* v. *Henson*, 231 U.S. 259. There is no finding made by Judge LaBuy concerning the entry of petitioner. The writer of the headnotes made no reference to the matter of entry. The Court of Appeals said, affirming Judge LaBuy, 256 F. 2d 487, 490; herein p. 818:

> "(4) The use by an alien of an assumed name to gain entry into the United States is ground for deportation, *London* v. *Clarke*, 229 F. 2nd 631, unless satisfactorily explained. *Leibowitz* v. *Schlotfeldt*, 94 F. 2d. 263."

The above (4) will be recognized by Your Honors as dictum on the part of the Court of Appeals in the denaturalization case, but did the Hearing Officer so recognize it? Did Judge Perry recognize it? Petitioner has reason from this record to fear that the above was regarded as an adjudication applicable in the case at bar as against petitioner. At the time of the above statement (4) by the Court of Appeals was made no deportation case had been instituted by the Government.

In *Morand Bros. Beverage Co.* v. *N.L.R.B.*, 204 F. 2nd 529, Judge Lindley made reference to the duty of a

reviewing court to not enter initial findings of fact. Also see *Johnson* v. *United States*, 256 F. 2nd 849. In *Parr* v. *United States*, 363 U.S. 370, 388. Your Honors noted that a certain theory was first interjected into the case by the Court of Appeals and not supported by the record. No such fact or theory as the one interjected was charged in the indictment, shown by the evidence or submitted to the jury in the *Parr* case.

We call attention to the judgment entered by Judge Wilkerson (App. 219) herein p. 863 and Certificate of Naturalization (App. 216) as a starting point from which to review the order of deportation. We respectfully represent that under the law, the judgment of naturalization constitutes a final determination of issues of fact, the establishment of which Congress made conditions precedent to naturalization. *Chicot County Dist.* v. *Bank*, 308 U.S. 371, 378; *United States* v. *Throckmorton*, 98 U.S. 61; *United States* v. *Richmond*, 17 F. 2nd 28.

Mr. Justice Douglas in *Knauer* v. *United States*, 328 U.S. 654, 670, distinguished *United States* v. *Throckmorton*, 98 U.S. 61 and *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 421, from which the following appears:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact; the establishment of naturalization. Those facts relate to the past—to behavior and conduct. But the oath is in a different category."

Your Honors do not have a communist case. There has been no suggestion to date that petitioner did not take the oath of allegiance in good faith. It becomes necessary to consider the extent to which the original proceedings in the Naturalization Court may constitute a final determination of issues of fact. Those facts relating to the past to

behavior and conduct. See *Klig* v. *United States*, 296 F. 2nd 343; *Chaunt* v. *United States*, 364 U.S. 350; *United States* v. *Tooma*, 187 F.Supp. 928.

Mr. Justice Brandeis in *United States* v. *Ness*, 245 U.S. 319, 324, said:

> "Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. * * * Naturalization granted without the certificate having been filed, is, therefore 'illegally procured': *United States* v. *Ginsberg*, 243 U.S. 472; and it may, at least where proceedings were ex parte, be set aside under §15."

At the time of the decision of the *Ness* case, citizenship could be revoked because of the failure to file a Certificate of Arrival. When Judge LaBuy heard the case relative to petitioner that jurisdiction had been removed by Congress. *United States* v. *Minevich*, 250 F. 2d 721, *United States* v. *Strongberg*, 227 F. 2nd 903. In *Johannessen* v. *United States*, 225 U.S. 227, 236, it was held that Congress might authorize a direct attack upon a certificate of citizenship. It must follow that, after some years of experience with a provision for cancellation on the ground of illegal procurement, Congress also had the power to cut down and curtail the authority previously granted.

Judge Wilkerson was not required to depend entirely on the Certificate of Arrival in order to find legal entry. The production of a Certificate of Arrival does not automatically obligate the naturalization court to hold that the entry was lawful and for the purpose stated. In *In Re Barron*, 26 F. 2nd 106, Judge Tuttle denied a petition for citizenship without prejudice, on the ground that although Barron presented a Certificate of Arrival showing entry for permanent legal residence in 1917, the evidence did not show actual residence until 1925, a shorter period than required by law.

We quote, p. 107:

> "The court is not bound by the recital of facts contained in the certificate of arrival. The facts shown on the certificate of arrival are to be taken into consideration, along with all the other facts and circumstances, in determining his actual intention and legal residence."

In the case at bar Your Honors must assume that Judge Wilkerson understood the law to be that petitioner was not entitled to be admitted to citizenship unless petitioner had become a lawful resident. Judge Wilkerson found explicitly that petitioner was a resident of Chicago and that he had in all respects complied with the Naturalization Laws. (App. 226; hereon p. 864. Judge Wilkerson had the power to find petitioner to be a lawful resident. In the absence of a record of the testimony heard by Judge Wilkerson, nobody can know the actual basis of this decision. All we know for sure is that Judge Wilkerson was satisfied with the evidence submitted. There appears an annotation in 22 A. L. R. 2nd 284, headed

What constitutes showing of good moral character on the part of an applicant for naturalization.

We quote pp. 292, 293:

> "There is a clear-cut conflict of authority as to the propriety of the court's consideration a petitioner's conduct prior to the five-year statutory period immediately preceding the filing of his petition for naturalization.
>
> Some courts consider that the petitioner's behavior during the entire time he had been in the United States is material and is properly introduced as evidence of his character.
>
> But other decisions recognize that commission of a felony, even if it involves moral turpitude, does

not impose a permanent disability and that the petitioner may thereafter reform and show good moral character so as to be eligible under the statute."

We quote from *United States* v. *Profact*, 274 F. 2nd 289, 292:

"Since good moral character during the prescribed five year period in this country was the sole test of good moral character, *Daddona* v. *United States*, 2 Cir., 170 F. 2nd 964; *Petition of Zele*, 2 Cir., 127 F. 2d 578, Id., 2 Cir. 140 F. 2d 773; *Application of Murrà*, 7 Cir., 178 F. 2d 670, and naturalization could not be denied on account of arrests prior to the five years of residence in the United States, it could honestly have been thought that the examiner was not interested in earlier, foreign, arrests."

In *In Re Bistpatou*, 100 F. Supp. 44, Judge Gourley admitted an alien to citizenship in spite of a previous conviction for voluntary manslaughter. The court looked into the facts relating to the killing. In the consideration of our claim of *res judicata*, Your Honors might conclude that when Judge Wilkerson found petitioner to have been of good character, Judge Wilkerson took into consideration any trouble in Italy or decided that such trouble was immaterial. In either event, the Hearing Officer was not free to again litigate the matter.

In *In Re Fanariotis*, 33 F. 2nd 313, the Government questioned the formal sufficiency of the Certificate of Arrival on the ground that it did not disclose the inspection, registry and payment of tax required. It was held to comply, p. 314:

"The statute requires only a certificate from the Department of Labor * * * stating the date, place and manner of his (the petitioner's) arrival in the United States."

Your Honors will notice the use of the expression "manner of arrival", used also on the Certificate of Arrival, herein p. 863. The "manner of arrival" question was answered by the name of the steamship Ryndam. So we conclude that "manner of arrival" as used here and in Section 291, calls for an answer as to the mode of transportation, steamship or railroad.

We quote from *In Re Pezzi*, 29 F. 2d 999, 1001:

> "In order to be entitled to naturalization, an alien must establish lawful entry into the United States as an immigrant with intent to remain in the United States permanently."

The Courts below have ignored the fact that petitioner must have established lawful entry as an immigrant with intent to remain and that Judge Wilkerson found that he had acquired that status in 1928.

We quote from *Tutun* v. *United States*, 270 U.S. 568, 578:

> "The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfilment of all conditions upon the existence of which the alleged right is made dependent; and he must estabish these allegations by competent evidence to the satisfaction of the court."

In re Vasicek, 271 Fed. 326, illustrates the rule that the burden rests on a petitioner for naturalization affirmatively to establish that he has fully met the requirements of the statute. Judge Dwyer has gathered the authorities relating to the various steps. We quote from *Petition of Lango*, 21 F. 2nd 968:

> "Under the law, it seems apparent that a declaration of intention can be made legally by an alien only when he is legally a resident of the United States."

The order of court (App. 219) admitting petitioner to citizenship herein p. 863 recites that the petition and affidavit were considered in support, together with further testimony taken in open court. The judgment (App. 217) herein p. 864 recites that

> • • • the court having found that the petitioner intends to reside permanently in the United States and that he has in all respects complied with the Naturalization Laws. • • •

Your Honors will note that Judge Wilkerson found as to petitioner

(a) His name was Paul DeLucia. On the reverse side of the Certificate there appears the following (App. 218),

> "By order of Court, name changed from Paul Maglio".

(b) then, in 1928, petitioner was a resident of Chicago (App. 217).

(c) petitioner had in all respects complied with the Naturalization laws. (App. 217).

Your Honors know, as to (b) that petitioner could not have been a resident if he had entered illegally. Judge Wilkerson may have found that the matter of entry was immaterial because petitioner had entered in 1920, before 1924, and more than five years had elapsed. As to (c), petitioner could not have complied with the Naturalization laws without a Declaration of Intention. Judge Wilkerson found that the Declaration of Intention (App. 267) was made legally while petitioner was a resident of the United States.

As was said in *Petition of Connal*, 8 F. 2nd 374, 375, it was not the intention of Congress to allow any alien, regardless of how he may have come into the country to

become a citizen, therefore a declaration of intention not made by a resident was invalid. *United States* v. *Kreticos*, 40 F. 2nd 1020.

The power was conferred on the District Court and the duty was imposed on Judge Wilkerson to adjudge whether or not petitioner should be admitted on the evidence which proved the date, place and manner of petitioner's arrival, his possession of the essential qualifications to entitle him to admission as a citizen, including residence and legal entry.

Your Honors have no way of knowing just what that evidence might have been, through no fault of petitioner. Judge Wilkerson approved of and accepted the evidence including the Declaration of Intention and the Petition for Naturalization, and admitted petitioner to citizenship. When the Hearing Officer decided that petitioner had entered illegally, that official failed to give the required legal effect to the judgment entered by Judge Wikerson. It appears that Judge Perry (App. 262), herein p. 843, was under the mistaken opinion that Judge LaBuy had found the entry to have been illegal.

We submit that if Judge LaBuy had cancelled because of illegal entry that would have been for illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. *United States* v. *Strombery*, 227 F. 2nd 903. Even if Judge LaBuy did have jurisdiction of a charge of illegal procurement, no such charge is in the Complaint. (App. 133).

We quote from *Schneiderman* v. *United States*, 320 U.S. 118, 160:

> "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Con-

sequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

What was involved before Judge LaBuy and there determined is to be tested by an examination of the record, including the pleadings, the evidence submitted and the respective contentions of the parties. *Cities Service Co.* v. *Securities and Exchange Comm.*, 257 F. 2nd 926, 930. Judgments must be interpreted in the light of pleadings. *Caprito* v. *United States*, 217 F. 2d 783. The Government, before Judge LaBuy, could not recover upon a cause of action different than that upon which the complaint was based. *Rosenfeld* v. *Lion Manufacturing Corp.*, 253 F. 2nd 90.

To sum up:

(a) This deportation case and the previous denaturalization case before Judge LaBuy are two different suits between the same parties.

(b) An inquiry must be made as to whether the allegation of unlawful entry, made before Judge LaBuy, was actually litigated and determined, not what might have been litigated and determined.

(c) Only upon matters actually litigated and determined is the judgment before Judge LaBuy to be regarded as an estoppel as against petitioner.

We quote from *Larsen* v. *Northland Trans. Co.*, 292, U.S. 20, 25:

"The established rule in this Court is that in a second action between the same parties, a claim different from one sued upon in a prior action is presented, then the judgment in the former case is an estoppel 'only as to those matters in issue or points controverted upon which the finding or verdict was rendered.'"

As was said in *Cromwell* v. *County of Sac.*, 94 U.S. 351, 356:

> "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

We quote further from *Larsen* v. *Northland Trans. Co.*, 292 U.S. 20, 25:

> "While a defendant must bring forward all purely defensive matter, he is not barred by a former judgment against him as to any matter which he was not bound to present and which was in fact not litigated. 'A judgment is not conclusive of those matters as to which a party had the option to but did not put in litigation in the action.' Freeman on Judgments 5th ed. §786."

After Your Honors correctly appraise the legal effect of the judgment by Judge LaBuy the authorities indicate alternatives as follows:

(a) Judge LaBuy had no jurisdiction and left the judgment by Judge Wilkerson stand as to lawful entry and required residence. The specific finding that petitioner had lawfully entered the United States, made by Judge Wilkerson, is res judicata against the Government in this deportation proceeding. If Judge LaBuy had no jurisdiction it makes no difference what Judge LaBuy may have said about entry and required residence.

(b) Judge LaBuy had jurisdiction to look into the matter of entry. But the Complaint (App. 133) did not charge illegal procurement. Then in the presentation of evidence before Judge LaBuy, the Government abandoned illegal entry and proved a legal entry. This fact therefore may not be again litigated and the Government is estopped.

We quote from *Semmes* v. *United States*, 91 U.S. 21, 27, 1 Otto 21, as quoted in *People* v. *Sbarbaro*, 386 Ill. 581, 592:

> "• • • as it is settled law that a judgment may be good in part, and bad in part—good to the extent it is authorized by law, and bad as to the residue."

The judgment entered by Judge Wilkerson may be good in part and have been vacated in part leaving some of it to stand. The part of the judgment by Judge Wilkerson which is good and left standing is that petitioner entered legally and established residence.

The judgment or decree entered by Judge LaBuy, even if the opinion be considered part of the decree, which we dispute, may be good in part and bad in part.

The Decree (App. 244) revokes the order admitting petitioner to citizenship and cancels his Certificate. The Decree contains nothing about entry or legal residence in the United States as established by the Wilkerson judgment. If the judgment entered by Judge LaBuy is now to be regarded as a revocation of the entire Wilkerson judgment as was held by the Court of Appeals in the case at bar we ask for application of the rule that part of the LaBuy judgment is void as beyond the power of Judge LaBuy. *United States* v. *Walker*, 109 U.S. 258; *Verbeem* v. *United States*, 154 F. Supp. 431 435; *In Re Denney*, 47 F. Supp. 36. *United States* v. *Stromberg*, 227 F. 2nd 903. In the construction of the judgment entered by Judge LaBuy we ask Your Honors to conclude that Judge LaBuy had no power to enter a judgment void because of limitation of jurisdiction, or improper because of the nature of the pleadings and the evidence. A judgment void on its face is in legal effect no judgment and does not constitute res judicata. *Jackson* v. *Vance*, 179 F. 2nd 154, 158. As was said in *In Re Mercer Irr. District*, 25 F.Supp. 981, 987, affirmed 114 F. 2nd 654:

> "The sole basis for judicial action is law and if there be none • • • the assumed court action is a nullity and neither confers or withdraws rights."

The judgment entered by Judge Wilkerson might be regarded as a voidable judgment. By authority of Congress, Judge LaBuy was granted a limited jurisdiction to void the previous judgment. Until set aside, a voidable judgment is not subject to collateral attack. 49 C.J.S. JUDGMENTS, §449 p. 880. We quote from *Briscoe* v. *Dist. of Columbia*, 221 U.S. 547, 553:

> "There is no possible ground for upholding the present collateral attack if the order was voidable only."

In affirming Judge LaBuy, the Court of Appeals recognized that Judge LaBuy had not made it clear as to what petitioner had concealed, 256 F. 2nd 487, 490, herein p. 818:

> • • • the court had in mind DeLucia's failure to reveal his convictions • • •

When Judge LaBuy and the Court of Appeals used the plural, "homicides", they included a conviction in 1924, entered in the absence of the defendant therein named (Ex. 38, App. 229). There is no evidence that petitioner even knew of the conviction when he was naturalized.

The Court of Appeals said, p. 490, herein p. 817:

> "The court stated as a conclusion that DeLucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office."

It is important now to keep in mind that Judge LaBuy and the Court of Appeals were called upon to decide on an issue

only as to alleged failure and misrepresentation, which took place eight years after entry. Neither the Hearing Officer nor Judge Perry had any right in the construction of the LaBuy judgment to add new provisions, omitted in the first instance. *Butler* v. *Denton*, 150 F. 2nd 687, 690.

Of course the questions printed in the forms could have requested details in such manner as to require petitioner to either admit or conceal the fact that when he entered he might have been excluded if a Board of Special Inquiry had been called. But there were no such questions. See dissent by Mr. Justice Douglas in *Costello* v. *United States*, 365 U.S. 265, 288.

Perhaps one reason for the absence of more printed questions on the forms in use in 1928 was that an alien who had passed inspection in 1920 was not excludable after he had become a resident.

In *Johannessen* v. *United States*, 225 U.S. 227, 242, it was said:

> "The Act makes nothing fraudulent or unlawful that was honest and lawful when done."

In *Tutun* v. *United States*, 270 U.S. 568, 579, the Government argued that §15, providing for cancellation, constituted a provision for review. This contention suggests that Judge LaBuy was authorized to review the judgment entered by Judge Wilkerson. We quote from 5 B, C.J.S. APPEAL & ERROR, §1951, p. 514:

> "An order, judgment, or proceeding dependent on or ancillary and accessory to, a judgment, order or decree which is reversed shares its fate and falls with it. This rule, however, will not operate, by implication to set aside a distinct and independent judgment or proceeding, although it forms a part of the same litigation, and it is sometimes held that the proceed-

> ings in the lower court previous to and not infected by, the error for which the judgment is reversed are not vacated thereby."

There can be no doubt that the judgment of Judge Wilkerson that petitioner had acquired legal residence was a judgment required as ancillary. The concealment or misrepresentation for which the judgment was vacated occurred eight years after entry.

The alleged concealment or misrepresentation occurred three years after petitioner had acquired legal residence. All the investigation possible to be made after the alleged false answer was made on the Preliminary Form (App. 206) in 1928 and before the Petition for Naturalization came on for hearing (App. 212) could not have developed any fact to show that petitioner had not acquired a legal residence and a status of non-deportability.

Even if an investigation developed all of the circumstances placed before the Hearing Officer and it could have been presented to Judge Wilkerson in 1928 by the Government, in opposition to petitioner's application for citizenship, Judge Wilkerson may have found that petitioner had acquired a residence in the United States. Judge Wilkerson may also have found, after considering all of the evidence now before the Administrative Agency, that petitioner was of good character and entitled to be admitted to citizenship. Petitioner must be judged by the law as it existed in 1928, not as it is today under the McCarran Act, as to what was material in 1928. Cf. *James v. United States*, 366 U.S. 213, 223. In 1928, a false answer as to an arrest was not material on the matter of entry and the acquisition of residence and a status of nondeportability. Even if Congress had the power to take away the status retroactively Congress could not turn back the clock and make an answer material in 1952 which was not material in 1928.

Mr. Justice Brandeis said in *Tutun* v. *United States*, 270 U.S. 568, 579:

> "The remedy afforded to the Government by §15 is narrower in scope than the review commonly afforded by appellate courts."

In the *Tutun* case, an action such as that before Judge LaBuy was referred to as "a bill in equity to cancel certificate of citizenship." We quote from 30 C.J.S. EQUITY, §612, p. 1010:

> "A single decree may have the effect of several separate decrees."

Citing *Hoier* v. *Kaplan*, 313 Ill. 448, 145 N.E. 243; *Walker* v. *Montgomery*, 236 Ill. 244, 86 N.E. 240. A decree must be construed with reference to the issues it was meant to decide. *Vicksburg* v. *Henderson*, 231 U.S. 259; *Oklahoma* v. *Texas*, 272 U.S. 21.

It becomes necessary to again study the opinion by Judge LaBuy, from which we quote, 163 Supp. 36, 37, 38, herein pp. 802, 804:

(a) "The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928.

(b) The next basic issue which the Government must prove is that this defendant falsely assumed the name of Paul Maglio *when he applied for his naturalization.*" (Italics supplied.)

We have copied all that Judge LaBuy designated as having been placed in issue before him.

(a) There was no dispute as to this fact.

(b) It will be noted that Judge LaBuy expressly limited the issue to the application for naturalization.

Judge LaBuy said nothing about any issue having been presented concerning entry.

> "A judgment is not conclusive on matters which were beyond the jurisdiction of the court or by reason of the nature of the case could not have been adjudicated." 50 C.J.S. Judgments §731, p. 222.

The complaint before Judge LaBuy alleged that naturalization was procured by concealment of material facts by willful misrepresentation (App. 136). This follows the language of §340 (a). *United States* v. *Minnerich*, 250 F. 2nd 721, 730, indicates that cancellation because of illegal entry would have been illegal procurement. Judge LaBuy had no jurisdiction to cancel for illegal procurement. In *Minnerich*, Judge Finnegan quoted the previous statute and held that the amendment indicated a shift by Congress from a broad ground to a ground more restricted. New legislation is to be construed in the setting of existing law and practice. *Bindczyk* v. *Finucane*, 342 U.S. 76, 93, dissent by Mr. Justice Reed, from which we quote:

> "Even the most comprehensive legislation cannot be considered as though it were the entire body of the law. The continuation of courts and practices is assumed."

Judge Finnegan said that there is a delusive exactness about the words "concealment" and "material fact". On what constitutes concealment of a material fact or wilful misrepresentation see annotation 5 L. ed. 2nd 120 United States Supreme Court Reports.

We respectfully suggest close study of the opinion of Judge Hall in *United States* v. *Kusche*, 56 F. Supp. 201. It was held under the previous statute that a judgment of naturalization was not res judicata if cancelled for "illegal procurement." Judge Hall made an examination of the authorities, in order to determine what was meant by Congress

by the term "illegal procurement." It must be assumed that Congress knew the law as it existed before this change and deliberately took away much of the jurisdiction previously afforded the District Courts. Mr. Justice Black in *James* v. *United States*, 366 U.S. 213, 231, made note that when Congress is dissatisfied with a decision it can and frequently does act to overturn it. Congress must have been dissatisfied with the result of legislation which required decisions like *Maney* v. *United States*, 278 U.S. 17.

In *Costello* v. *United States*, 365 U.S. 265, Your Honors were considering misrepresentations alleged to have been made concerning the five years of residence. Materiality was plainly demonstrated. In *Polites* v. *United States*, 364 U.S. 426, 430, Mr. Justice Stewart added this footnote:

> "The court also found that the petitioner had procured his citizenship fraudulently. The respondent now states that it does 'not now rely upon the fraud finding as an alternative basis for the judgment of denaturalization.' In the light of its concession that, 'in view of the state of this particular record,' the finding of fraud was not supported by sufficient evidence, we proceed upon that premise."

It is our contention that Judge LaBuy had no jurisdiction to cancel on any ground but concealment of material facts or misrepresentation. It is obvious that the concealment or misrepresentation must have been accomplished before Judge Wilkerson or in the proceedings before the Naturalization officials. Concealment or misrepresentation at the port of entry would be a horse of a different color.

After Your Honors study the table prepared by Judge Hall in *United States* v. *Kusche*, 56 F. Supp. 201, 210, it may be possible to ascertain what was intended by Congress when Congress eliminated "illegal procurement" from the jurisdiction of Judge LaBuy. Judge Hall has

listed *United States* v. *Parisi*, 24 F. Supp. 414, as a case which amounts to illegal procurement alone. The misrepresentation of the alien was as to a basic statutory condition respecting his lawful entry. Congress took jurisdiction from Judge LaBuy, if it be determined here that the case at bar resembles *Parisi* and the naturalization was illegally procured by petitioner. Your Honors will notice from *United States* v. *Stromberg*, 227 F. 2nd 903, that the Government sought to denaturalize Stromberg on the ground that because a conviction prior to entry he could not have lawfully resided in the United States. It was held that such ground would be illegal procurement, over which the District Court had no jurisdiction under the McCarran Act.

We quote from *United States* v. *DeLucia*, 256 F. 2nd 487, 490, herein p. 818:

> "While the Court did not expressly indicate what is meant by the words 'the concealment of other material facts' * * *"

In other words, the Court of Appeals found some difficulty in ascertaining from the opinion of Judge LaBuy just what Judge LaBuy had in mind and intended as a basis for the Decree (App. 244). We quote from *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2nd 304, 310:

> "If the precise question here involved was raised and determined adversely to appellant in that suit, it would operate as an estoppel by judgment in the present suit. But if the judgment in the former suit could be based on an issue not involved in the later suit and it is not made to appear on which of the several issues the judgment was based, estoppel by judgment does not arise."

We quote from 50 C.J.S. JUDGMENTS, §§613, 624, pp. 36-50, citing *In Re Power*, 115 F. 2d 69; *Abraham* v. *Casey*,

179 U.S. 210, and *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F. 2nd 497:

> "In order to render a judgment a bar, it is also essential that it be so far specific and definite and free from ambiguity or contradictions as to show clearly what was the claim or cause of action adjudicated * * * nor is the scope of the estoppel to be determined by the reasoning of the court, the substantial effect of the actual decision being the only consideration * * * A judgment affirmed on appeal is final and res judicata provided the judgment is of such nature that it would have been final and res judicata in the absence of an appeal."

All of this brings us back to another appraisal of the opinion rendered by Judge LaBuy. We respectfully suggest that Your Honors start with a study of the decree (App. 244). Only the Certificate of Naturalization has been cancelled. Nothing about entry or required residence. Under F.R.C.P. 52(a) and 54(A) findings are not part of the decree. *Wabash Corp.* v. *Ross Electric Corp.*, 187 F. 2d 577, 592.

As was said in *De Sollar* v. *Hanscombe*, 158 U.S. 216, 227, quoting from *Russell* v. *Place*, 94 U.S. 606, 608:

> "Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."

The precise fact decided by Judge LaBuy, if we keep in mind the limitation placed upon Judge LaBuy by the complaint and the evidence, is that petitioner misrepresented and falsified about a material fact. We ask—material about what? Cf. *United States* v. *Profaci*, 274 F. 2nd 289. The only answer held to be false was about an arrest. The Court of Appeals construed the opinion of Judge LaBuy to mean, p. 490:

> "DeLucia's failure to reveal his convictions for homicides in Italy * * *"

This failure took place eight years after entry. The determination of issues actually litigated is conclusive. *Cities Service Co. v. Securities and Exchange Comm.*, 257 F. 2d 926, 930. Now Your Honors are respectfully requested to determine if the precise fact determined had anything to do with entry.

We repeat the above quote from the Court of Appeals p. 490, herein p. 818:

> "DeLucia's failure to reveal his convictions for homicides in Italy * * *"

A re-examination of the records, including the opinion by Judge LaBuy, must compel Your Honors now to perceive that the "failure to reveal" must mean failure to reveal to the Naturalization Examiners. Judge Perry in answer to our point said; (App. 260), herein p. 841:

> "* * * he perpetrated a fraud on the government in obtaining his immigration visa."

There is no evidence to support such conclusion. The "failure to reveal" can not legally be extended from failure to reveal to Examiners to "failure to reveal" to the American Consal and the inspectors at the port of entry.

In other words, the issue decided before Judge LaBuy is different than the issue decided before the Hearing Officer. The issue as to entry was the same before Judge Wilkerson as before the Hearing Officer.

See *Davis v. McKinnon & Mooney*, 266 F. 2nd 870, 872 for a statement of the fundamental principle of jurisprudence concerning facts settled by judgment in a previous action.

We contend that these findings made by Judge Wilkerson as to legal entry and residence act as a bar, under the law of res judicata. Res judicata usually concerns itself with evidentiary or intermediate facts determined in the

prior litigation. *United States* v. *Carlisi*, 32 F. Supp. 479, 482.

The Government is bound by the Judgment entered by Judge Wilkerson and can not escape its effects by producing new argument or new evidence in a subsequent action (these deportation proceedings) in support of the proposition decided against it before Judge Wilkerson. *Tait* v. *Western Maryland Railway Co.*, 62 F. 2d 933, affirmed, 289 U.S. 620. Ignorance or mistake concerning the facts at the time of the Wilkerson finding could not be of help to the Government. *Guettel* v. *United States*, 95 F. 2d 229.

The intent of Congress is often immaterial on fundamental principles of jurisprudence concerning the law applicable to judgments. We quote from 50 C.J.S. JUDGMENTS, §613, p. 36:

> "The question whether the rules of res judicata should be applied to a particular decision is from its nature a question of law and does not rest in the discretion of the court."

It must follow that a Hearing Officer has no discretion, nor did Judge Perry.

The importance of a determination of the precise issues litigated before Judge LaBuy might be pointed up if Your Honors will consider the following quoted from 50 C.J.S. §597, p. 15:

> "A party who is entitled to claim the benefit of a former judgment may waive, or be estopped to assert the right."

Included in the cases cited as are *Murrell* v. *Stock Growers*, 74 F. 2d 827; *Donald* v. *White*, 68 F. 2d 441; *Hickox* v. *Johnson*, 9 F. 2d 498; *Uranium Co.* v. *Benton*, 149 F. Supp. 667; *Syms* v. *McRitchie*, 187 F. 2d 915; *Seagram Distillers Corp.* v. *New Cut Rate Liquors*, 245 F. 2d 453.

We quote further from §507:

> "Somewhere a party * * * joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it * * * he will be held to have waived the benefit of the estoppel and the case may be determined as though no such former judgment had been rendered."

So, assuming for the sake of argument that Judge LaBuy made null and void the entire proceedings before Judge Wilkerson and the decree entered by Judge LaBuy estopped petitioner from litigating the subject of entry, the Government waived the benefit of that estoppel by opening the matter again before the Hearing Officer.

In its brief to the Court of Appeals on our appeal from Judge LaBuy, the Government included the following p. 3:

> "Congressional bar makes inapplicable to these proceedings the doctrine of *res judicata*; or are estoppel and *laches* applicable to the Government in these proceedings."

Authorities were cited including *Johannessen* v. *United States*, 225 U.S. 227; *Maney* v. *United States*, 278 U.S. 17; *Luria* v. *United States*, 231 U.S. 9; *United States* v. *Ness*, 245 U.S. 319; *United States* v. *Ginsberg*, 243 U.S. 472; *United States* v. *Siegel*, 2 Cir. 1945, 152 F. 2d 614, cert. den. 328 U.S. 868; *United States* v. *Hauck*, 2 Cir. 1946, 155 F. 2d 141; *Knauer* v. *United States*, 328 U.S. 654, 673; all decided before Congress changed the law as to denaturalization as appears in *United States* v. *Stromberg*, 227 F. 2d 903. We respectfully ask that Your Honors reconsider the authority of *Johannessen et al* in the light of the new statute. The Government asserted that the new statute had

the effect of further restricting the doctrine of *res judicata*. We quote, p. 8:

> "Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. See, *e.g.*, *Lurig* v. *United States*, 231 U.S. 9. Without distinction between intrinsic or extrinsic fraud, have the courts held this to be so."

As we understand the previous decisions *Johannessen et al.* the claim made by the defendants that the Naturalization judgment stood as a bar to Denaturalization Your Honors rejected this claim on the ground that Naturalization had been illegally procured. Now that Congress has repealed illegal procurement as a ground, we contend that Congress has closed the gates sufficiently to put back the bar as far as the case heard by Judge LaBuy was concerned.

The Hearing Officer unlawfully placed the Burden upon Petitioner.

In answer to our contention, the Court of Appeals said, herein p. 850:

> "He recognized the government's counter burden of showing unlawful entry and there is ample evidence that this burden was sustained."

The Hearing Officer did no such thing. We quote from the transcript (App. 103):

> Hearing Officer: "Well, I would like to have the record reflect that Mr. Stewart has been advised of the provisions of Section 291 of the Immigration and Nationality Act, which provides in part,
>
> > 'In any deportation proceeding under Chapter 5 against any person the burden of proof shall be upon such person to show the time, place and manner of his entry into the United States, but in

> presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records not considered by the Attorney General to be confidential pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law." "

Mr. Stewart: May I call your Honor's attention to the fact that that regulation just read doesn't state how that proof shall be made and it is our position that the proof of the entry has already been made and you will find it in those exhibits.

Hearing Officer: "Well, I will consider the issue in examining the transcript and the exhibits in the record."

In his opinion, the Hearing Officer said (App. 124):

> "Counsel for the respondent makes the claim that the respondent *has met the burden* of establishing the time, place and manner of his entry into the United States on the basis of the evidence already in the record, and he stated that he would offer no additional evidence." (Italics supplied).

It is obvious that the Hearing Officer here refers to the burden on petitioner, as he understood it, created by §291.

We quote from the Board of Appeals (App. 131):

> "The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 U.S.C.A. 1361)."

What the Board of Appeals said may be put like this:

> Respondent stood mute after having been advised that Section 291 cast the burden upon him.

Judge Perry did not mention our point.

The Hearing Officer had before him the Certificate of Arrival, herein p. 863 showing the time, place and manner of entry. Also he had before him the ship manifest (App. 268) in corroboration of the Certificate of Arrival. The Hearing Officer also had in evidence petitioner's Declaration of Intention (App. 267) sworn to by petitioner and accepted by the Examiners, upon which judgment had been entered fixing the time, place and manner of entry. Also, the Petition for Naturalization (App. 212) including another sworn statement by petitioner as to time, place and manner of entry.

Before the Hearing Officer warned us of Section 291, including his construction of the statute, the record before him showed the time, place and manner of entry without dispute. But the Hearing Officer refused to accept the facts, in the absence of testimony from petitioner. In *United States v. Murff*, 170 F. Supp. 182, District Judge Dimock has held that the burden of showing the entry to be unlawful rests upon the deporting power. We quote p. 184:

> "Section 291 of the Immigration and Nationality Act, 66 Stat. 234, 235, 8 U.S. Code §1361, provides: 'In any deportation proceeding under chapter 5 against any person, the burden of proof shall be upon such person to show the time, place and manner of his entry into the United States, * * *

> The corresponding section of the earlier law was Section 23, Immigration Act of 1924, 43 Stat. 165-166, 8 U.S.C. §221, which provided: '(1) In any deportation proceeding against any alien the burden of proof shall be upon such alien to show *that he entered the United States lawfully*, and the time, place and manner of such entry into the United States.' (Emphasis supplied.)

(1) In *Ulisidis* v. *Holland*, 3 Cir., 245 F. 2d 812, at page 814, Circuit Judge Hastie said: 'Actually, it was necessary to show only the single fact that the respondent was an alien, for, once that is proved, the legislative scheme requires the alien to justify his presence within the United States. 66 Stat. 234, 8 U.S.C. §1361.' "

When the Hearing Officer placed the burden on petitioner to prove a lawful entry, the Hearing Officer already had before him the Declaration of Intention (App. 267) as approved by Judge Wilkerson and the judgment entered by Judge Wilkerson (App. 219, 216) establishing that petitioner had become a lawful resident.

Judge Dimock said,

"Despite Judge Hastie's statement, it seems plain to me that Congress, by eliminating from the old law the provision requiring the alien to support the burden of showing that he entered the United States lawfully, leaves him with only the specified burden of showing the time, place and manner of his entry into the United States. The burden of showing that it was unlawful rests upon the deporting power."

Ulisidis v. *Holland*, 245 F. 2d 812, 150 F. Supp. 678, involves alien crewmen, who stayed beyond permits and who did not claim lawful entry. District Judge Cork, 150 F. Supp. 682, cited a case decided in 1927, *United States* v. *Flynn*, 22 F. 2d 174, and did not find it necessary to construe Section 291, as it now appears in the act of June 27, 1952, c. 477, Title II, ch. 9, §291, 66 Stat. 234, 8 U.S.C.A. §1361.

Ulisidis is easily distinguishable from the case at bar. In *Ulisidis* the Hearing Officer had enough evidence in the record to show that the crewmen were in this country illegally, having overstayed their leave. It was up to them to justify their presence or to suffer the consequence of leaving

abundant evidence uncontradicted. In the case at bar, the evidence already before the Hearing Officer justified petitioner's presence as a legal resident.

It is contended here that the Hearing Officer made a mistake in the construction of Section 291 and consequently placed the burden on petitioner to make further proof of a lawful entry. As was said by Mr. Justice Frankfurter, concurring in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 597:

> "Courts do enforce the requirements imposed by Congress upon officials in administrating immigration laws, *e.g., Kwock Jan Fat* v. *White*, 352 U.S. 454, and the requirement of Due Process may entail certain procedural observances. *E.G. Ng Fung Ho* v. *White*, 259 U.S. 276."

Please see dissenting opinion in *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 598, on the right of a resident alien to be free from arbitrary banishment.

United States v. *Curran*, 15 F. 2d 127, affirmed *Vajtauer* v. *Comm'r of Immigration*, 273 U.S. 103, will demonstrate to Your Honors that if proceedings against petitioner had been conducted in 1924, the burden would have been different (§23 Comp. St. §4289 $\frac{3}{4}$ kk). In *United States* v. *Comm'r. of Immigration*, 36 F. 2d 239, decided when the old law was in effect, the absence of a record of the admission of the alien was said to have increased his burden. The presence of a record in evidence in the case at bar and the change in the terms of the statute should have influenced the Hearing Officer.

In the case at bar, the stipulated evidence demonstrated the time, place and manner of the entry in 1920 into the United States by petitioner. The burden of showing that such entry was unlawful rested upon the deporting power.

From the record, including that above quoted, it appears that the Hearing Officer made a serious mistake as to the law applicable.

The Court of Appeals said, herein p. 850:

> "It is respondent's contention that his reliance upon the Fifth Amendment in refusing to give additional information resulted in an inference by the Hearing Officer that the Section 291 burden was not met."

The Court of Appeals does not mention the case of *United States* v. *Murff*, 170 F. Supp. 182, or the fact that the statute has been changed and the Hearing Officer ignored the change and proceeded as if the old law were still in effect. The Hearing Officer assumed that a presumption or inference created by §291 and the failure of petitioner to testify took precedence over undisputed contrary evidence and a judgment of court. It was held in *McAdams* v. *United States*, 74 F. 2nd 37, that although possession of recently stolen property may call for explanation, explanation need not come from defendant.

In *Smith* v. *United States*, 157 F. 2d 176, 185, it was held that the theory on which the case was tried was so fundamentally wrong that the mistake called for reversal.

The Administrative Agency Acted on the Assumption that Section §291 of the McCarran Act Took from an Alien the Privilege against Self-Incrimination.

We quote from the opinion of the Hearing Officer (App. 123):

> "Upon examining these materials, I am not convinced that answers to the questions propounded to the respondent and which he declined to answer would support a conviction under a Federal Criminal Statute. * * * In finding that deportability has been established, no inferences need be drawn from the respondent's

claim of the privilege against self-incrimination nor from his silence, and a finding of deportability is based solely on the evidence of the record."

We submit that a study of the entire opinion will demonstrate that the Hearing Officer in fact did draw an unfavorable inference. We again quote (App. 109):

> "As a basis for declining to answer these questions, the respondent invoked the privilege against self-incrimination under the Fifth Amendment. The respondent was informed of the provisions of Section 291 of the Immigration and Nationality Act, which provides, in part, that in any deportation proceeding the burden of proof shall be upon the person under deportation to show the time, place and manner of his entry into the United States; and that if such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law. Counsel for the respondent was asked whether he wished to present any evidence in this matter and he stated that he would offer no additional evidence and that the evidence relating to the respondent's entry into the United States was already in the record."

It must be remembered that the evidence was in the record by stipulation. It was evidence furnished to the officials under oath in the naturalization proceedings, verified and accepted by them and made a part of the judgment entered by Judge Wilkerson. It is significant that Mr. Freedman asked petitioner questions as to entry and then stopped, apparently in reliance upon Section 291, as construed by the Government. In other words, the officials believed that the Fifth Amendment was qualified by Section 291.

Judge Perry said (App. 252), herein p. 833, after setting out the questions asked by Mr. Freedman:

> "No further questions were asked of him by the Examining Officer."

In other words, it can be seen from the record that in the first stages of this case, Section 291 was held to nullify the Fifth Amendment, so long as the questions were limited to the matter of entry. The Board of Appeals also found it significant to construe the Fifth Amendment in conjunction with Section 291. We again quote (App. 131):

> "The respondent stood mute in this proceeding as he did when before the United States District Court for the Northern District of Illinois. The respondent was advised of the provisions of Section 291 of the Immigration and Nationality Act (8 U.S.C. 1561)."

We submit that the Court of Appeals misapprehended the record in holding that the Hearing Officer did not rely upon the silence of petitioner. We quote, herein p. 850:

> "Respondent attacks the fairness of the administrative hearing with his claim that an improper inference was drawn from his refusal at the hearing to answer questions concerning his entry * * *
>
> "Without reaching the question of whether such an inference could be made, it is apparent from the record that the Officer did not rely upon any such inference."

The Hearing Officer did rely upon such inference, only he called it a presumption based on the authority of Section 291.

The Court of Appeals said, herein p. 851:

> "While respondent may have been within his rights in refusing to testify at the hearing, it does not follow that his reliance on the Constitutional protection can be used as a weapon to attack the fairness of the hearing in claiming that the government could only discharge its burden of proving his deportability by drawing unwarranted inferences from his refusal to testify."

The Court of Appeals has misapprehended our contention. The Hearing Officer threw the refusal to testify into the scale on the erroneous belief that petitioner was either required to testify or be presumed to be in this country illegally. The presumption made the burden easier on the Government. The Hearing Officer did not care why the petitioner did not testify. That must be the one reason the Hearing Officer could say: (App. 124)

> "In finding that deportability has been established, no inferences need be drawn from the respondent's claim of the privilege against self-incrimination nor from his silence, and a finding of deportability is based solely on the evidence of record."

But the Hearing Officer had regarded the evidence of record to be weighted with a presumption that petitioner was in the United States illegally and that presumption could only be erased, if at all, by testimony from petitioner.

We quote from *United States* v. *DeLucia*, 256 F. 2nd 493, 495, herein p. 826, which opinion was before the Administrative Agency:

> "To us it appears clear that he was entitled to rely upon the privilege which he claimed."

In addition to the information before the Court of Appeals at the time of its decision in the above contempt case, the Hearing Officer was informed as follows: (App. 101)

> Mr. Stewart: "* * * it will be seen that if Paul DeLucia answered these questions he would be acting as a witness against himself on possible charges of conspiracy and entering the country without right and getting others to assist him to do that, and that could be charged to be a continuing conspiracy—that is, as long as he stayed here he was carrying out the objective of that conspiracy, which consisted of many things illegal under the federal laws."

Surely the Hearing Officer did not intend to overrule the Court of Appeals on the law of the case. The record, we submit demonstrates that the Hearing Officer believed that the fact that this is a deportation case made a great difference, that the McCarran Act gave him the right to treat petitioner as if he were an alien at our gates seeking admission. It must be that the Hearing Officer believed that § 291 gave him authority to rule contrary to the Court of Appeals.

In the case at bar, the Court of Appeals makes no mention of *United States* v. *DeLucia*, 256 F. 2d 493, herein p. 823. Apparently the Court of Appeals has approved of the position taken by the Hearing Officer.

The error of an administrative tribunal may be so flagrant as to convince the court that the hearing accorded was not a fair one. *Tisi* v. *Tod*, 264 U.S. 131. A resident alien is within the protection of the Fifth Amendment. See cases cited in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590. In *Grunewald* v. *United States*, 353 U.S. 391, Mr. Justice Black said concurring, p. 425:

> "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution."

Mr. Justice Harlan said, p. 424:

> "If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter

completely. "On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible."

If the Hearing Officer really had given no heed to the claim of privilege in the consideration of the evidence that would be one thing, but the danger that he made impermissible use of the event is far from negligible.

In *United States* v. *Roberson*, 233 F. 2d 517, the Government seized an automobile claiming that it was being used in violation of gambling laws. The District Judge found for the defendant and the Government appealed. Judge Cameron said in affirming the trial judge, p. 519:

> "It is equally well settled, however, that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a *prima facie* case. It will not excuse a failure of the Government to meet the burden of establishing facts sufficient to make out a case for forfeiture. Until the Government has sustained the burden of producing evidence establishing its right to forfeiture, the claimant had no call to bring forward any evidence at all, but was entitled to submit the case to the fact finder, trusting solely to the weakness of the Government's evidence.
>
> (3, 4) It is not necessary to discuss the effect of the permissible presumption in a proper case because it is clear that the Government's proof did not establish even a *prima facie* case for forfeiture. It was necessary for the Government's evidence, of itself, to be sufficient to support the judgment sought. The Government's evidence and all inference which may be drawn therefrom, were entirely inadequate to support its demand for condemnation and forfeiture. We cannot say that, in the face of this weak showing, it was not natural and prudent for the claimant to intro-

duce no evidence at all. He was in position to rest secure upon the failure of the Government to make proof which would justify forfeiture. Under these circumstances, the failure of the claimant to testify cannot work against him so as to supply a case where, before, none existed."

The Petition for Naturalization subscribed and sworn to by petitioner on April 10, 1928, includes the following (App. 212):

"Fourth, I emigrated to the United States from Boulogne, France, on or about the 1st day of August anno Domini 1920, and arrived in the United States, at the port of New York City, on the 10th day of August anno Domini 1920, on the vessel Ryndam.

"Fifth. I declared my intention to become a citizen of the United States on the 9th day of January, anno Domini 1925, at Chicago, Illinois, in the Circuit Court of Cook County. • • •

"Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America and that his name be changed to Paul DeLucia. • • •

"Declaration of Intention No. 162,822 and Certificate of Arrival from Department of Labor filed this 10th day of April, 1928."

The attached Certificate of Arrival (Photosat in Vol. II, p. 1 of App. in 12903) herein p. 863, correctly shows the time, place and manner of arrival. This Petition for Naturalization including the Certificate of Arrival, was before the Hearing Officer as an exhibit (App. 121). The Hearing Officer had before him the record showing that

Judge Wilkerson had accepted and approved the showing made by petitioner, as to the time, place and manner of entry. Petitioner could not have been a resident, as required by law, unless he had entered legally. It has been held that if the Hearing Officer failed to consider evidence before him he exceeded his authority. *Lloyd* v. *Etting*, 287 U.S. 329, 339.

The Hearing Officer construed Section 291 in such manner as to require petitioner to either testify or suffer the penalty of a presumption that petitioner was an alien in the United States in violation of law.

The Administrative Tribunal failed to distinguish between a passport issued to petitioner and one issued to another and used by petitioner.

The failure on the part of the courts below to make the proper distinction started with the opinion rendered by Judge LaBuy, from which we quote, herein p. 809:

> "The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention had been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States."

We quote from *United States* v. *Goldstein*, 30 F. Supp. 771, 733, cited by Judge LaBuy:

> • • • what the respondent offered was a passport, not issued to him, but to his cousin. • • •

In the case at bar the passport was issued to petitioner, at any rate there was no evidence to the contrary. The theory of the Government was that it could be found that petitioner had no passport at all, as charged in the warrant (No. 5, App. 84).

In *United States* v. *Shapiro*, 43 F. Supp. 927, 928, the question resolved against the defendant was,

> "Can the United States of America cancel a certificate of citizenship issued to an alien, *where the evidence discloses* that the alien secured both a visa and a passport which had been issued to another person and the alien represented herself to be that person." (Italics supplied)

In the case at bar the evidence did not disclose any such thing, yet Judge Perry assumed that it did so disclose.

In the case at bar, there is no charge in the warrant that petitioner entered without inspection, but the Administrative Tribunal did use the same reasoning as that rejected in *Ex Parte Gouthro*, 296 Fed. 506, affirmed 8 F. 2nd 1023. In the case at bar it was said that the passport was no passport. In the *Gouthro* case it was said that the inspection was no inspection. We quote, p. 509:

> "The third and last ground for the deportation of the petitioner as stated in the warrant, is the finding that she 'entered by means of false and misleading statements, thereby entering without inspection.' The provision of the statute relied on by the government in this regard is section 19 of the Immigration Act (Act of February 5, 1917, c. 29, 39 Statutes at Large, 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §4289¼ jj]), which provides, among other things, that:
>
> > 'Any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.'

"It will be noted that all of the provisions just quoted are directed against, and obviously designed to prevent, the entry of aliens surreptitiously and without an opportunity on the part of the immigration officials to ascertain, in the manner provided by law, whether such aliens are entitled to enter this country. The only question in this connection which is material here is whether the petitioner entered the United States 'without inspection.'"

Certain datum-points must be accepted as having been proved, including the following:

(1) Petitioner had a passport.

(2) Petitioner had a visa.

Otherwise, according to the testimony of Ferro (App. 90) petitioner would have been stopped and held for a Board of Special Inquiry. The Government caused a subpoena to be served on petitioner commanding him to produce his passport and other travel documents. (Ex. A-59, App. 277) Petitioner did not contest the right of the Government to issue the subpoena as did the alien in *Sherman* v. *Hamilton*, 295 F. 2nd 516.

Petitioner said he could not find the papers previously in his possession (App. 97). This gave the Government the right to prove the contents of the documents demanded by secondary evidence. The Government did not avail itself of this right. Instead the officials relied upon Section 291 and put the burden on petitioner to show a lawful entry with a valid passport and visa.

By the testimony of Ferro (App. 90), the Government produced enough to create an inference that the name on the passport presented by him was Paolo Maglio, because that was the name on the manifest. The Hearing Officer ignored other notations on the manifest to raise the infer-

ence that the passport identified petitioner and could not have identified the witness Maglio, including height, occupation and complexion.

We quote from *Viannopoulos* v. *Robinson*, 247 F. 2d 655, 658:

> "Furthermore, we conclude that, on the basis of the record before us, the order is not supported by evidence which is reasonable, substantial and probative of the issue. Of course, we are aware of the narrow scope of review within which we must operate and recognize that the matters of credibility are properly for the trier of the facts. However, as pointed out in *Consolidated Edison Co. of New York* v. *N.L.R.B.*, 305 U.S. 197, 229: 'substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Further, although it is up to the trial tribunal to resolve the conflict of testimony, nevertheless, as emphasized in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488: 'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'
>
> "The court, in *Universal Camera*, 340 U.S. at page 488, added:
>
> > 'Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the 'body of evidence opposed to the Board's view.' "

The rule is stated in *Zito* v. *Mottal*, 174 F. Supp. 531, 537 and authorities are collected in re inferences drawn by an administrative trier of fact. The test of substantial evidence is not satisfied by evidence which gives equal support to inconsistent inferences.

The Hearing Officer said (App. 121):

> "The evidence in the record has established that the respondent entered the United States in August 1920 by assuming the identity of Paolo Maglio and was not held for hearing before a Board of Special Inquiry. *It is reasonable to conclude that at the time of the admission the respondent presented a passport* in the name of Paolo Maglio and thereby gained entry into the United States. It has been established that the respondent is not Paolo Maglio and that he is, in fact, Felice DeLucia. He, therefore, did not present a passport showing his true identity; *he was not the person described therein;* and the passport presented did not constitute a passport within the provisions of the Executive Order." (Italics supplied.)

So Your Honors may perceive that the Hearing Officer has found that petitioner presented a passport. The Court of Appeals said, herein p. 848:

> "The respondent did not produce his passport at the hearing as requested. The Officer concluded, however, that he possessed a passport at the time of his entry into this country because, as the evidence showed, if he were not in such possession, he would have been detained at the point of entry for a Board of Special Inquiry and a notation of this would have been made on the ship's manifest."

In the absence of the production of the passport, we request an examination of the evidence in order to determine if

> "*he was not the person described therein.*"

We are able to demonstrate from the exhibits that petitioner in fact was described in his passport. Also that the witness Maglio was described differently in his passport. We have in the record the original passport of the witness Maglio, as Ex. 14-K (App. 275). He was described therein, as we have set out in our statement.

Please note the differences between the witness Maglio and the petitioner.

We note that the witness Maglio has signed his passport. Now as we examine the manifest (Ex. 13, App. 272) we observe that the witness Maglio is described thereon, including a notation of his height as 5 feet 3 inches. Complexion nat. Color of eyes, brown. Ex. 14-K (App. 274) includes a description of the witness Maglio as having eyes of light blue. We assume that the Inspector checked this height and other items of personal description with the passport, as did the surgeon. The witness Maglio was required to take a writing test, so we assume that the Inspector made certain that his signature corresponded with that shown on his passport. We are left to guess as to how the Inspector happened to admit an alien, described on the manifest as having brown eyes, and in the possession of a passport describing the holder as having light blue eyes. Also we know from Ex. 14-J (App. 272) that at the time of entry the witness Maglio was a soldier of Italy on convalescence leave, not a civil employee. We do not know whether Mr. Beck knew about that or not. Nor do we know what Mr. Beck would have done about the light blue eyes, except that apparently the witness was admitted without a Board of Special Inquiry.

With reference to the Inspector we quote from *Ex Parte Gouthro*, 296 Fed. 506, 511, affirmed 8 F. 2nd 1023:

> "The legal presumption, in the absence of any evidence to the contrary, must be that he properly performed the duties required of him and that what he did constituted whatever inspection was required under the circumstances."

In the absence of any evidence as to what took place between the witness Maglio and the Inspector, we must assume that the witness explained differences between his

passport and his personal description. The Inspector either knew the correct color of his eyes or the Inspector should have known. The Inspector had a duty and a responsibility which has been disregarded by the Hearing Officer in the consideration of the case before him as to petitioner.

The mere mention of such facts should help to show how unreliable is circumstantial evidence after a main actor had died and the Government relies upon proof of usual procedure. *Cf. United States* v. *Cufari*, 120 F. Supp. 941, 217 F. 2nd 404; *United States* v. *Profaci*, 274 F. 2nd 289.

Now we turn to the manifest of the S.S. Ryndam (Ex. 7, App. 268) and find that petitioner is described as having a fair complexion and a height of 5 feet 7 inches. We assume, in the absence of any other evidence, that petitioner's passport is in the same form as that shown for the witness Maglio. Therefore petitioner's passport included a description of petitioner as being fair complexion, height 5 feet, 7 inches. We assume that petitioner's passport was signed by him. That petitioner also submitted to a writing test. So we conclude that the Inspector must have known that petitioner was in fact the person described in his passport.

The fact that the two aliens were examined by the same Inspector within a period of about two weeks should lead to the conclusion that the passport held by petitioner was in fact issued to him. Certainly Mr. Beck knew that he had admitted two different men, one 5 feet, 3 inches, the other 5 feet, 7 inches in height; one with light blue eyes, and the other with brown eyes; one of natural complexion, the other fair; one a soldier claiming to be a civil servant, the other a day laborer. Surely Mr. Beck gave but slight importance to the name alone.

The Certificate of Naturalization (App. 215) bears a description of petitioner. Such description corresponded with the description shown on the manifest. It can be deducted that the manifest and the passport were either alike, or any differences were explained to the satisfaction of Mr. Beck. The purpose of the Government in producing the testimony of Ferro (App. 90) as we understand it, was to show that if petitioner had presented a passport disclosing any difference between the passport and the manifest, petitioner would have been stopped for the Board of Inquiry. The Government argues from the failure of Mr. Beck to stop petitioner that his passport and the manifest must have been in agreement as to the name used by petitioner. The Hearing Officer paid no attention to other notations on the manifest to identify petitioner as the holder of a passport issued to him and to no one else.

The lack of value as to the testimony of Ferro (App. 90) and the explosion of the Government theory, is made evident when we notice that Mr. Beck passed the admission of the witness Maglio, shown on the manifest to have eyes of brown, in possession of a passport describing the holder with the eyes of light blue. We might assume further that the witness Maglio or someone explained how the passport and the manifest happened to differ, whereupon Mr. Beck accepted the explanation and passed the alien. In other words, Mr. Beck exercised a great deal of authority in excess of that explained by Mr. Ferro.

Also the Declaration of Intention (App. 267) includes a description of petitioner. Here again the Examiners made a check and found that petitioner had been properly described. All of this culminated in a description contained in the Certificate of Naturalization (App. 215) is

sued by Judge Wilkerson to the effect that petitioner has a height of 5 feet 7 inches.

The record relative to the witness Maglio was also before the Hearing Officer. He was described in his passport as having a height of 5 feet 3 inches. This height was noted on the manifest (Ex. 13, App. 272) This short height was also recorded on the Declaration of Intention (Ex. 8, App. 269) made by the witness Maglio. It was checked by the Naturalization Examiners and included as a description of him in his Certificate of Naturalization (App. 271)

After Your Honors examine the record it will be observed that petitioner must have been described in his passport and the witness Maglio was described differently in his passport. It is true of course that the name Maglio was the same for petitioner and for the other immigrant.

But the name alone would not matter. The assumed name of Maglio was in fact petitioner's name at the time of entry, even if it be shown that Maglio was not the name given him at birth. Judge Major said in *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263, 265:

> "We reach the conclusion under the circumstances presented, that no fraud was intended, and, as a matter of fact, none was perpetrated on this government by appellee in obtaining his immigration visa.
>
> "Whether the use of such name and age enabled him to escape military service in some other country, we are not directly concerned. He was within the quota provision, could have obtained his visa by stating his correct name and age, and otherwise met the prescribed requirement to enable him to effect a legal entry. Therefore, the misrepresentations complained of were irrelevant and do not constitute grounds for deportation."

In *In Re Leibowitz*, 49 F. Supp. 953 where Judge Holly admitted this alien to citizenship the District Court said, p. 954:

> "The Circuit Court of Appeals held that the alleged false statement made by him as to his name to obtain entry to the country was not sufficient grounds for deportation and I am of the opinion that the use by him of the name Feive Leibowitz is not a sufficient reason for denial of naturalization. (2) As a matter of fact his name at the time of his entry into the United States was Feive Leibowitz. At common law and in the absence of statutory restriction an individual may lawfully change his name without resort to any legal proceeding and for all purposes the name thus assumed will constitute his legal name, just as though given at birth. *Reinken* v. *Reinken*, 351 Ill. 409 413; 184 N.E. 639; *United States* v. *McKay*, D.C. 2 F. 2d 257; *Christianson* v. *King County*, D.C. 196 F. 791. And the fact that he took the name of another living person, even the name of his brother, it seems to me, does not change the rule."

The case at bar and the cited case would be much alike if the Government now filed a denaturalization case against Leibowitz based upon the same objection considered by Judge Holly. Your Honors know of course that the next judge would lack jurisdiction to try the objection over again. After all, a judgment does settle some things. We request attention to *United States ex rel. Fink* v. *Reimer*, 96 F. 2nd 217:

> "See also same case in 16 F. Supp. 487. It appears that in previous litigation the citizenship of this defendant was cancelled and he pleaded guilty to an indictment charging him with procuring naturalization illegally. The correctness of the denaturalization or the legality of the jail sentence was not before the Court in 16 F. Supp. 487. Here we have a habeas corpus proceeding intended to stop deportation."

As a part of the return in this *Fink* case, defendant's admissions made to the Examiner give the whole story of the fraud perpetrated by him in obtaining his immigration visa. He pretended to be one Apfelroth who had previously started proceedings to obtain a preference because of a son living here. Judge Hand said p. 218:

> "An alien who enters under a passport and visa fraudulently obtained is 'not entitled' * * * to enter under the Act of 1924. It is true that to be admitted as a quota immigrant Fink only had to have an unexpired immigration visa, section 13(a) (1) of the Quota Act of 1924, 8 U.S.C.A. §213(a) (1), and that he did have one; both passport and visa were in fact issued to him, that is, to the man who appeared before the officials though under the name, Apfelroth. It is hardly true, therefore, to say that the documents were 'no' passport and 'no' visa; *they were not for instance like passports issued to another person, whom the bearer pretends to be.* Moreover, a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue the visa. *United States ex rel. Iorio v. Day*, 34 F. 2d 920; *United States ex rel. Leibowitz v. Schlotfeldt*, 94 F. 2d 263; *McCandless v. United States ex rel. Murphy*, 47 F. 2d 1072, appears to be the contrary. In the case the fraud here was essential to success; Apfelroth could get a preference visa, Fink could not." (Italics supplied)

After Your Honors learn from the record that petitioner and the witness Maglio were distinguished as two different persons, the name used should have little significance.

Judge Perry said: (App. 260) herein p. 841:

> "One who presents a passport issued in the name of another is not presenting identification of himself."

This improperly assumes that the identification of the holder of a passport is limited to the name.

The Court of Appeals said, herein p. 848:

> "This recital of facts makes it apparent that DeLucia materially misrepresented his name, age, birthplace and parentage, and that he assumed the identity of another, namely, Paul Maglio. Accordingly, there was substantial evidence before the Special Inquiry Officer to find that respondent entered this country without a valid passport showing his identity."

The misrepresentation of name, age, birthplace and parentage is not enough under the circumstances to assume the identity of another. All of the tribunals below have ignored other facts to show that it was impossible for petitioner to assume the identity of the witness. As Your Honors must know from the record, the passport did identify petitioner as distinguished from the witness Maglio. The Hearing Officer neglected to give heed to the effect of the decision made by Mr. Beck to admit petitioner and the witness Maglio in spite of differences between the passport and the facts ascertained at the port of entry. It must be remembered that the law provided a penalty put on ship owners for bringing aliens known to be not admissible. *Italia* v. *Durning*, 115 F(2d 711. A ship doctor would not mistake a 5 foot seven inch man for one 5 feet three inches, a brown-eyed man for one with light blue eyes. We conclude that each man was described differently from the other in his passport. No one concerned would depend on the name alone. The passport in each case was visaed by the American Consul. (Ex. 14K, App. 274) We assume that the passport and visa presented by petitioner also bore numbers. The Government is in possession of a record of these numbers. In the absence of the production of this evidence, we assume that the numbers on petitioner's passport differ from the numbers on Ex. 14K. It follows that each of the aliens had his own passport.

Suppose the witness was before the Hearing Officer on the charge that he did not have a passport showing his identity because his passport describes him as having blue eyes. Would not it be fair to assume, in the absence of the testimony of Mr. Beck or any other evidence on the subject, that the witness convinced the Inspector that his passport had been issued to him in spite of the difference between the passport and the manifest? Would it not be fair to assume that the witness explained that the notation of his occupation as a civilian (App. 274) instead of as a soldier on leave was also explained.

The testimony of the witness Maglio before Judge LaBuy (App. 147) shows that he claimed that he had lived in Apricena all his life prior to leaving for the United States "except when I was in the army * * *. I served in the Italian Army from 1917 to 1920."

Giving the impression that the obligation had ended prior to leaving. His military record (Ex. 14-I, App. 272) shows that he was called to active service Feb. 2, 1917, given one year convalescence leave August 18, 1919, not discharged until September 12, 1921. So when he took the boat, it appears that he was a soldier on leave. We may assume that the witness explained how it happened that his hair was said to be black in his passport (App. 275) and brown on the manifest (App. 272). As to petitioner is it not fair to assume that Mr. Beck satisfied himself as to identity.

There was no evidence as to who made up the manifest or where the maker of the manifest obtained the information to be found on the manifest. The Hearing Officer must have made inferences concerning where the information had been obtained and then must have made more inferences based on the first inferences.

We must give credit to the assumption that the Hearing Officer and the officials of the Board of Appeals knew that in 1920 violation of the Passport Act did not authorize deportation. Their contrary decision can be understood, we submit, if Your Honors determine from the record that the Administrative body construed the McCarran Act, Section 241 (a) (1) of the Immigration and Nationality Act, to express the intention of Congress to put all aliens back at our gates and to treat them as if they were just arriving. The administrative officials have failed to heed *Shaughnessy* v. *United States*, 345 U.S. 206, 212, where it was said that aliens who have passed through our gates, even illegally, may be expelled only after proceedings conforming to due process of law.

The facts proved, if fairly considered, must lead Your Honors to conclude that plaintiff entered by virtue of a passport, duly issued to him and further that he presented a valid visa as required.

After Your Honors study the testimony of Mr. Ferro, (App. 90) it will be observed that Mr. Ferro told us what might happen if petitioner had no passport or had presented a passport in a name other than Maglio as per the manifest. Petitioner would have been held to a Board of Special Inquiry. We assume that if any questions arose suggesting that Mr. Beck, the Inspector, might be inclined to reject petitioner, Mr. Beck would not take the responsibility alone. He would give the alien a chance before a Special Board. The Government at the deportation hearing left us to guess what may have happened if Mr. Beck had proceeded to assume the responsibility of passing on questions raised in his mind and had decided to admit petitioner. Concerning inspection it was said in *Ex parte Gouthro*, 296 Fed. 506, aff'd 8 F. 2d 1023:

> "Even if the petitioner made false and misleading statements to him (the inspector) he was not obliged

> to accept them as true, or to refrain from such further questions and investigations as would enable him to reach a proper conclusion as to the right of petitioner to enter the country."

We quote from Auerbach, IMMIGRATION LAWS OF THE UNITED STATES, 2nd Ed., p. 359:

> "The initial examination of an alien, called primary inspection, is conducted by an inspecting immigration officer. He can admit but not exclude the alien."

The Hearing Officer ignored the fact that the executive Department had delegated authority to Mr. Beck. Mr. Beck made a decision based upon the evidence before him, that petitioner was eligible for admission. From the manifest and the statute requiring a registry, we know that Mr. Beck paid particular attention to the personal description of an alien, his age, occupation, height, color of hair, color of eyes and complexion. In the absence of evidence of what Mr. Beck acted upon, the Hearing Officer arbitrarily assumed that petitioner had made untruthful statements to Mr. Beck. Although Mr. Beck could not be produced because of death, other officials no doubt participated. There has been no attempt to explain the absence of other evidence. The testimony of Ferro leaves much to speculation. Mr. Beck made a decision within the scope of his authority, acting for the Attorney General. Petitioner relied upon the decisions made by Mr. Beck, filed his Declaration of Intention and renounced his allegiance to the King of Italy. We refer to *United States* v. *Certain Parcels of Land*, 131 F. Supp. 65, where the doctrine is considered. So we submit that the matter of deciding who has the burden of proof becomes extremely important. Especially when the record presents serious gaps and failure of proof relative to entry. Error of law which precludes investigation of essential facts on hearing makes

the hearing unfair. *Ex Parte Ver Pault*, 86 F. 2d 113, *Gegiow* v. *Uhl*, 239 U.S. 3.

It should be accepted as a fact that petitioner did have a valid visa. Otherwise, according to Ferro (App. 90) petitioner would have been stopped and held for a Board of Special Inquiry. In § 1361; Title 8, we find the following:

> "* * * If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa, or other document required for entry, shall be issued to such person, nor shall such person be admitted to the United States."

In *Silva* v. *Tillinghast*, 36 F. 2d 801, Judge Morton said p. 802:

> "The question which the case presents is whether the immigration tribunals had the right to go behind the visa, to examine into the facts on which it was based, and having concluded that it was erroneously issued to disregard it."

The question whether the immigration officials had this right, at the time of entry, does not arise for the reason that such officials accepted the visa and admitted petitioner. At this late date, forty years after the acceptance of the visa, the immigration tribunal has ignored the visa. The Hearing Officer has disregarded the fact that the Government suppressed the evidence which would have shown what may have been before the American Consul when the visa was granted. The Hearing Officer and the Court of Appeals gave no heed to the visa and its effect. Judge Perry said (App. 261) herein p. 841:

> "In misrepresenting, as he did, his true identity, he perpetrated a fraud on the government in obtaining his immigration visa."

There is not a scintilla of evidence as to any representation, true or false, made by petitioner in order to obtain his visa. There is a presumption that the Consul did his business in a proper manner. *United States* v. *Chemical Foundation*, 272 U.S. 1, 14; *Ussi* v. *Folsorn*, 254 F. 2d 842. Presumption of validity attends official action and the burden of proof to the contrary is upon those who challenge the action. *Aero Mayflower Transit Co.* v. *Carpentier*, 167 F. Supp. 898.

When petitioner obtained his visa the burden was on him. The fact that he satisfied the Consul is shown by the issuance of the visa. To say now that he met that burden by some fraudulent misrepresentation is arbitrary, in the absence of any evidence as to what representations were made.

After observing that the consular officer was required to pass upon questions of fact and of law, the court said in *Silva*, p. 802:

> "He belongs to an entirely different department of the government from the immigration bureau; and to hold that his decisions on such matters are reviewable by the immigration tribunals would be basically inconsistent with the general principles of our government administration. * * * the immigration tribunals have no right to refuse admittance upon the ground that the visa presented was in their opinion mistakenly or improvidently granted by the consul."

If the immigration tribunals had no right to refuse admission, certainly they have no right to deport upon the ground that, in their opinion, the visa was mistakenly or improvidently granted by the Consul. Particularly in the absence of any evidence as to what had taken place before the American Consul. Whether or not the immigration officials could have turned back petitioner in 1920 on

the ground that his visa should not have been issued is a moot question. They accepted the visa and should not be permitted to ignore that action, especially in the absence of any mistake on the part of the Consul. The adverse action of the Administrative Tribunal can be understood only if Your Honors accept its construction of the McCarran Act, a construction which permitted it to regard petitioner as if he stood at the gate in New York.

In *Hempel* v. *Weedin*, 23 F. 2d 949 (Reversed 28 F. 2d 603) the alien claimed to have told the consul about his foreign conviction prior to the issuance of his visa. Judge Cushman said, p. 951:

> "* * * otherwise it does not appear reasonable that he would have obtained the visa."

The Immigration Official who heard the deportation case wrote the Commissioner General of Immigration and received this reply, p. 951:

> "If any official document having reference to the matter was filed with the American consul, it is probably attached to the immigration visa, which should be in the files of the Naturalization Bureau at Washington, to which reference may be had if the point is considered material."

Judge Cushman said:

> "There has been no showing that such papers as those mentioned were not attached to the Immigration visa."

The law required a number for the visa and that number to be on the manifest. We have been unable to find the number of the visa on the photostat of the manifest. It may be there to be seen on the original. The Inspectors at the port of entry were required by law to preserve the visa, so Your Honors are required to accept as a fact that a copy of the

visa, together with a copy of the papers required for its issuance, are now in the possession of the Immigration Officials.

In the absence of the production of evidence in the possession of the Government, we assume that the American Consul was informed as to any trouble petitioner may have had with the authorities in Italy. If in fact petitioner was convicted of a crime in his youth, the American Consul was in a better position to determine whether or not it included moral turpitude than the Hearing Officer, guessing fifty years later and thousands of miles from the scene.

Your Honors no doubt have examined enough records to have knowledge of the avenues open to the Immigration Authorities for investigation. The absence of evidence from the American Consul and the Italian Officials about passports leads us to suggest that the information obtained was suppressed. In *Ex parte Motoshige*, 6 F. Supp. 792, the administrative tribunal received a letter from the United States Consul that no passport had been issued to the alien. This case suggests some of the avenues which were open for investigation. Naturally we assume that the Government officials actually made full use of all avenues of information.

> "Failure to produce evidence within the control of a party raises the presumption that, if produced the evidence would operate against him; and every intendment will be resolved in favor of the opposite party; * * *" *Shiell v. London Amusement Co.*, 123 F. 2nd 302, 306.

Also please see cases cited in 31 C. J. S., EVIDENCE § 156, p. 847.

The Government Suppressed Important Evidence Within the Control of Its Officials.

As far as this record discloses, the Consul knew, at the time of the visa, all that has been learned since that date by all of the other departments of the government put together. It is fair to assume that Mr. Rando (App. 154), at the time of his investigation, in 1957, knew of its purpose and had such information as Your Honors may now derive from the various exhibits in evidence. Mr. Rando knew that, from his Declaration of Intention (App. 267) and Petition for Naturalization (App. 212), petitioner arrived on the steamship Ryndam, after embarking in France. Mr. Rando knew that petitioner passed inspection at New York and was admitted as the bearer of a passport together with a visa. Mr. Rando also knew the name on the passport and of the fact that petitioner had had this name changed by Judge Wilkerson. Not a word did Mr. Rando say as to whether petitioner had used the name Maglio in France or Italy. Surely Mr. Rando must have inquired. One of the first things Mr. Rando did, no doubt, was to inquire about the passport and the visa. The fact that he did not tell Judge LaBuy what was learned by him and the fact that he did not produce any papers or records concerning the passport and the visa issued to petitioner, must compel any fair minded person to conclude that the passport and the visa were found by him to have been regularly issued. Mr. Rando obtained copies of birth and death certificates, marriage records and various papers purporting to show a criminal record. Now we know from the various documents put in evidence that Mr. Rando must have known, in view of the pendency of a denaturalization suit, that the passport and visa might be drawn into question.

Is it not fair to assume that Mr. Rando inquired of the American personnel and inspected the records, to deter-

mine how much the Consul knew about the personal history of petitioner and whether or not that official had been deceived? Of course we know that that must have been one of the first things Mr. Rando inquired into. Yet we do not find a word in his testimony concerning such matters. Keep in mind that we here deal with the testimony of a lawyer, an expert, experienced in such matters. It must be remembered that Judge Perry found that petitioner committed a fraud on the government in obtaining his immigration visa (App. 261), herein p. 841. Judge Perry failed to notice that the Government suppressed evidence on the manner in which the visa was obtained. The finding made by Judge Perry has absolutely no support in the evidence. Suppression of evidence or concealment from a party whose rights are being determined by an administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding. *Lloyd* v. *Ettica*, 287 U.S. 329, 339. In *United States* v. *Curran*, 298 F. 951, Judge Hand spoke of the unfairness of a judgment made without seeing a paper, said to be in the possession of the Consul. We quote from Kansas, Immigration and Nationality Act (1953) p. 131:

> "One who swears falsely before an American Consular officer who is empowered by law to administer oaths (22 U.S.C. 131) commits a crime against the United States. A deliberate false oath is always an act involving moral turpitude. (Administrative Decisions Vol. I, p. 14; *Kaneda* v. *United States*, 278 F. 694; *Masaichi Ono* v. *Carr*, 56 F. 2d 772; *U. S. ex rel. Mauka* v. *Palmer*, 67 F. 2d 1146)."

Is it not fair to conclude that if petitioner had misrepresented anything or sworn falsely before the American Consul that the Government would have proven the fact? In the absence of this evidence, petitioner should have

been afforded a presumption which has been ignored to date, although often requested below.

Your Honors will note that Mr. Rando took pains to make it clear that he did not testify that the documents were all of the documents he found or brought back (App. 156). Mr. Freedman, representing the Government at the deportation hearing, demonstrated that more evidence, in addition to that before Judge LaBuy, was required as to entry. He caused a subpoena to be served, demanding that petitioner produce his passport. When petitioner said he was unable to find the passport (App. 97), the door was then opened to permit the introduction of secondary evidence. But no evidence was produced, further than the exhibits and the testimony of Ferro (App. 90). This demonstrated circumstantially that petitioner entered legally in possession of a proper passport plus a regular visa. Your Honors are left to speculate as to why Mr. Freedman did not follow up on his demand for production of the passport.

We assume that when Mr. Freedman prepared the subpoena (Ex. 59 A, App. 277) he expected to be required to prove, either by direct evidence, or by secondary evidence, just what travel documents were used at the time of entry. The situation was altered when the burden had been improperly shifted to petitioner at the hearing.

Judge Perry said (App. 260), herein p. 841:

> "Petitioner had not previously assumed or used the name of Paul Maglio."

This finding is contradicted by the record. We know that petitioner was using the name Maglio when he obtained his passport. This date is not shown because the Government chose to suppress the evidence. Your Honors will note from *United States* v. *Grabina*, 119 F. 2d 863, that the de-

fendant obtained his papers under the name of Ginsberg. Judge Swain said p. 864:

> "The use of the name Ginsberg was not intended to deceive, and so far as appears, did not deceive the officials who passed upon his eligibility for naturalization. His declaration of intention and his petition gave the date of arrival, the name of the vessel and the port which he entered. Anyone checking his entry must have known that he entered as Josek Grabina."

So the change of name did not in fact deceive the officials.

In view of the record showing that the Naturalization Court heard witnesses in open court (App. 217), the fact that the petition requested a change of name (App. 207) and the statutory requirement that good cause must be shown, before a name change will be allowed, it is fair to assume that Judge Wilkerson satisfied himself as to the reason petitioner made his original application in the name of Maglio. In *In re Perkins*, 204 Fed. 350, the citizen sought to amend the record as to his name. It was held that after the term had passed, the court could not alter its judgment, which spoke correctly as of its date. In *United States* v. *Batikoter*, 228 Fed. 918, it was held that the age of the petitioner was a question of fact settled by the Naturalization Court. In his Preliminary Form (App. 207) petitioner said his name was Paul Maglio and that he also had used the name of Paul DeLucia. It may be presumed that the Naturalization Judge inquired as to the true name and ascertained enough of the facts to make an intelligent judgment. If in fact the Naturalization Judge ordered the change of name without requiring any explanation from petitioner, there had been no representations, true or false. If the Naturalization Court acted upon the Petition for Naturalization (App. 214), alone, all that contained was a prayer.

Your Honors will notice, from the photostatic copy of the Petition for Naturalization (App. 212, 214, Vol. II, p. 1) that just above the signature Paul Maglio and added by typewriter there appears the following:

> "• • • • and that his name be changed to Paul DeLucia."

This petition was prepared under the supervision of the officials by a clerk in the office of the Service (App. 141). It is fair to assume that before this request for change of name was included there had been some discussion. On the reverse side of the Certificate of Naturalization there appears the following (App. 217):

> "By the order of court, name changed from Paul Maglio."

The Hearing Officer gave no heed to the above judicial finding that the name of your petitioner before the legal change, had been Paul Maglio. Upon this review of the deportation proceedings, Your Honors are requested to note that the Naturalization Court has found, in a judgment binding upon all concerned, that:

(a) The name had been Paul Maglio.

(b) The name was changed to Paul DeLucia.

There is no evidence as to when petitioner first adopted that name, or his reasons. Upon his Preliminary Form we find the following (App. 208):

> (i) I purchased the ticket on which I came to this country at *Naples Italy*. It was purchased by *an Agency*. (Italics handwritten.)

Surely Mr. Rando inquired in Naples and learned the details but the result of his investigation was suppressed.

In the absence of any evidence to the contrary we must assume that the passport was issued to petitioner under

"that name": We also know that he obtained a visa under that name. The visa was issued to petitioner. We must conclude this in the absence of contrary evidence. It is fair to assume that Mr. Rando learned the date of the purchase of the ticket. Mr. Rando learned the mode of travel from Italy to France, how long petitioner resided in France and if he used the name Maglio in France.

In *United States* v. *Grabina*, 119 F. 2d 863, as we have said, the alien entered under the name of Josek Grabina. When he filed his first papers he did so under the name of Ginsberg. Petitioner in the case at bar filed his first papers under the name he bore at the time of entry. The following appears in the testimony of Examiner Jordan (App. 188):

> Q. On the face of Exhibit 2 it says: "Petitioner wants: Paul DeLucia" What does this mean?
>
> A. That he wanted to include in his petition a prayer for a change of name.
>
> Q. His name being Paul Maglio and he wanted it changed to Paul DeLucia?
>
> A. That is right.
>
> Q. But the practice was to require him to sign in his present name?
>
> A. That's right.
>
> Q. Not in the name he wanted?
>
> A. That's right.

The point is that the inspectors and Naturalization Examiners knew when and where the alien entered, as to petitioner and as to Grabina. The Government recognized and approved of the fact that petitioner had previously been known as Maglio. When petitioner signed his name to his Petition for Naturalization we know from the evidence that the Naturalization Examiner knew that he had used two names. When petitioner applied for his visa we don't know anything about the names used because the

evidence was suppressed. When petitioner applied for entry, we do not know what the Inspector knew about names used because of the absence of evidence on the subject.

Your Honors will observe that in the warrant, petitioner is alleged to have been also known as Paul Salvi and as Paul Ricca. The officials could have said, also known as Paolo Maglio, but such identification has been avoided.

The Hearing Officer considered matters not introduced in evidence, in the absence of proof.

We quote from *Yiannopoulos* v. *Robinson*, 247 F. 2d 655, 657,

> "(3) However, after scrupulous examination of the record, we conclude that most of plaintiff's objections were well founded and that by the admission of a mass of incompetent, irrelevant and hearsay evidence, though form was observed, plaintiff was denied the substance of a fair hearing. There is no need to go to great lengths in describing the multitude of erroneous rulings presented by the record. Indeed, such an attempt would be misleading, for, as previously stated, the ordinary rules of evidence are not generally adhered to. Rather, it is the overall denial of justice which impels our conclusion. Suffice it to say, that, without the admission of this evidence, it is, at least, highly uncertain whether the finding of the Special Inquiry Officer would have been made. It is on this basis that we conclude that the hearing was unfair. This line of thought finds support in the language of the Supreme Court in *Bridges* v. *Wixon*, 326 U.S. 135, 156: 'In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong • • • or by showing that incompetent evidence was admitted and considered • • • *But the case is different where evidence was improperly received and where but for*

that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing * * *." (p. 658) (Emphasis supplied by Judge Lindley:)"

We carry our argument a step further and contend that the evidence improperly received was insufficient to stop up the gap left in the evidence by the Government at the close of the case before the Hearing Officer. The improper evidence took the Hearing Officer off on the wrong track. We might have prevented this if the improper evidence had been introduced in our presence.

The statute, 8 U.S.C.A. § 1252 (b) provides that:

> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government;

The real question should have been what information was in the hands of the American Consul and what did that official determine concerning the nature of the crime?

Another real question left unanswered was what did the Inspectors at the Port of entry know concerning the previous history of petitioner?

The Hearing Officer acted in the face of an uncertainty as to whether petitioner was the same person described in the records offered to prove the former conviction. Nothing had been proved to show that the Italian court had jurisdiction of petitioner or of the subject matter.

The charge made was as follows: (App. 84)

> 6. You were convicted in the Ordinary Court of Assize at Naples, Italy on May 18, 1917, for the crime of voluntary homicide;

The findings of the Hearing Officer were founded upon some papers brought from Italy by Mr. Rando (App. 154),

supplemented by some evidence introduced in our absence after the hearing closed. Exhibit No. 36 (App. 224) is dated July 23, 1954 and is sworn to March 27, 1957 by one describing herself as Officer in charge of the Archives, having charge of Penal Sentences issued by Judicial Authorities, attesting that the Exhibit No. 36 is a true copy. It recites that one Felice DeLucia was found guilty by a jury of voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances. It recites that penalty was set on May 18, 1917 under Articles 364-51-55 of the Penal Code. Ex. 36 does not show the presence of the person sentenced, either at the time of sentence or at the time of the verdict. The Hearing Officer and the Courts below failed to notice the variance between

(a) Voluntary homicide and

(b) Voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

We objected on the ground that one could not assume that (a) and (b) were alike. One would have to gain some knowledge of Italian law to understand the meaning of (b). We said (a) in this country might be a crime of moral turpitude. We have no such crime as (b), although we do have cases of killing without crime and without moral turpitude. There had been no proof of any foreign law before the Hearing Officer, but after the hearing was closed, the Hearing Officer obtained additional evidence in our absence and attached the affidavit of an interpreter to his opinion (App. 125).

Your Honors will find that the interpreter has translated five codes. He does not say that they have anything to do with Exhibit No. 36 or any other exhibit. All the interpreter did was to swear that the pages submitted by him in Italian had been translated. A

fair hearing would have required that we be given a chance to cross examine the interpreter. We would like to know how he obtained the five codes, if they contained all of the law or have they been supplemented by other codes or decisions? What is the law of Italy concerning moral turpitude as to the crimes shown in the exhibits? If our cross examination of the interpreter developed the fact that he knew nothing except that the papers had been exhibited to him by the Hearing Officer, naturally we would have asked that official to explain when and where he obtained the information. In *Kwock Jan Fat* v. *White*, 253 U.S. 454, the officials omitted some evidence upon which a decision had been made, in the case at bar the officials added some evidence. In either event "it was not a fair report and a hearing based upon it was not a fair hearing." Compare *McConney* v. *Rogers*, 287 F. 2nd 473 where the Hearing Officer used a deposition taken without previous notice.

Neither court nor administrative body can take notice of laws of a foreign country. *Smith* v. *Hays*, 10 F. 2d 145. Such laws must be pleaded and proved the same as any other question of fact. *United States* v. *District Director of Immigration*, 106 F. 2d 14. Other authorities collected in 31 C.J.S. EVIDENCE, §21, p. 537. WIGMORE EVIDENCE, 3rd Ed. §1697, p. 11, quotes from Lord Denman:

> "Proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law and this book truly states the law' then you have the authority of the witness and of the book."

In *Dallas* v. *Katagiri*, 256 F. 2d 545, a denaturalization proceeding, the Government neglected to prove the law of Japan as a fact.

The Board of Appeals said (App. 130):

> "Exceptions have been taken to the finding of deportability. Counsel urges that the evidence is insufficient to support the order of deportation and that the special inquiry officer's conclusions are contrary to law. It is alleged that the special inquiry officer 'considered matters not introduced in evidence in the absence of proof.'"

That is all that was said about matters not in evidence. The Board did not rule expressly on our claim of error.

We quote from Judge Perry (App. 263), herein p. 844:

> "This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute."

This may be somewhat ambiguous. There can be no question but what the Hearing Officer took the code in our absence. Judge Perry must have meant that the codes were not evidence. The Government in its brief, pp. 5 and 29, took this position:

> "The Italian Code was not evidence, but represented legal research of the Special Inquiry Officer in assessing the legal consequences of the established facts. • • • The special inquiry officer's examination of the the Italian law can be described as a form of official or administrative notice."

It certainly appears from the opinion of the Hearing Officer (App. 122) that that official regarded the five codes as evidence. The Court of Appeals said, herein p. 849:

> "Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the

Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion."

This puts the case before Your Honors in this posture

(1) The Hearing Officer felt the need of the five codes and based an illogical argument on them.

(2) Judge Perry said the five codes were not evidence.

(3) The Court of Appeals said that the Government does not need the five codes or any foreign law as evidence.

The trouble with (3) is that

(a) There was no proper evidence of any conviction.

(b) Prevalent standards are of no value in the understanding of the effect under the law of Italy of the various crimes mentioned in the exhibits.

The Hearing Officer realized that some knowledge of the law of Italy was necessary. If the conviction had been murder or larceny or some such crime internationally known to include moral turpitude, prevalent standards might have been sufficient, but there exists no prevalent standard for

(b) voluntary homicide with grave provocation and carrying a gun under extenuating circumstances.

There is no evidence in the record that the five codes are in fact copies of the Italian statute. They were regarded by the Hearing Officer as evidence. They were acquired by him in some undisclosed manner and made a part of the record in our absence. The Hearing Officer said (App. 122):

"The pertinent statutory provision relating to voluntary homicide is Article 364 of the Italian Penal

Code, which was in existence in Italy at the time of the offense in 1915 and the conviction in 1917."

Nowhere in the record can be found any evidence to show that this was the pertinent statute, or that it was in existence at the time of the offense or conviction. The record, including the evidence taken in our absence, does not purport to show that the five codes constituted all of the law of Italy on the subject. The Hearing Officer said: (App. 122)

> "An English translation of Article 364 is as follows: 'Whomsoever who for the purpose of killing causes the death of a person is punished by reduction in a penitentiary for eighteen to twenty-one years.' • • •
>
> The record establishes that the conviction was for an intentional or voluntary homicide since by statute a penalty is provided for persons who 'for the purpose of killing cause the death of a person.' The phrase 'for the purpose of killing' necessarily implies that there was an intent and that the act was voluntary."

The Hearing Officer has omitted the following heading (App. 127)

> HOMICIDE

The Hearing Officer also omitted the figures (365-367-369-376-380) (App. 127) which indicates that sections of the five codes have been omitted.

Of course Your Honors know that the Appendix attached by the Hearing Officer to his opinion did not contain all of the law of Italy on the subject. An examination of Ex. 38 (App. 229) will show

(a) A conviction may be had in the absence of a defendant.

(b) An indictment may include the concept that the killing was the result of a father's overbearing will.

(c) Under this concept, the principal was found not guilty.

(d) The statute of limitations runs while a convicted person is out of the country.

(e) There had been an amnesty by Royal Decree as to some crime.

An examination of Ex. 39 (App. 236) will show

(f) That a defendant may be found by a jury to "deliberately, with intent to kill * * * under aggravating circumstances of premeditation partial mental infirmity and extenuating circumstances."

(g) The defendant in (f) was sentenced with a reduction of sentence because of mental defect and with another reduction in view of the extenuating circumstances.

In the United States, the term Homicide includes killings without moral turpitude. In the absence of any proof on the subject we assume that the law of Italy also provides for homicides that are not murder or manslaughter. The reasoning of the Hearing Officer seems to go like this

(a) I find a definition of a crime in the statute

(b) I believe that the definition is intended to cover crimes in which there had been moral turpitude

(c) I assume that the conviction shown in Exhibit 36 was for the crime I find in the definition."

When a lawyer deals with foreign law, he is well advised to approach that subject with a high degree of intellectual humility. Weiner (1950) EFFECTIVE APPELLATE ADVOCACY, p. 146, in reference to *United States* v. *Rodick*, 117 F. 2d 588; Cf. *Diaz* v. *Gonzalez*, 261 U.S. 102, 105, per Holmes J.

We quote from *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 933:

> "We are not unmindful of the myriad decisions sponsoring various concepts of moral turpitude. They offer no well settled criteria."

Here in a footnote will be found reference to some cases. Judge Barnes said further, pp. 935, 937:

> "It has been held in certain cases that the crime of which an alien was convicted twice (in order to deport him, 8 U.S.C.A. § 1251 (a) (4)) must *necessarily* involve moral turpitude to warrant deportation." (Emphasis added) In these cases it is said that:
>
> > "• • • when by its definition (the crime) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." *United States ex rel. Robinson* v. *Day*, 1931, 2 Cir., 51 F. 2d 1022, involving forgery, and suspended sentence: *United States ex rel. Griffo* v. *McCandless*, D.C. 28 Fed. 2d 287, 288 (involving aggravated assault and battery); *United States* v. *Carrollo*, D.C. 1939, 30 F. Supp. 3, 7 (involving income tax violation § 145 (b); *United States ex rel. Giglio* v. *Neelly*, 1953, 7 Cir., 208 F. 2d 337, 340-342 (involving counterfeiting pennies).'

But, *United States ex rel. Zaffarano* v. *Corsi*, 2 Cir., 63 F. 2d 757, 759, in the Per Curiam opinion on Petition for Rehearing, explains that the judgment alone does not control; the indictment is properly considered in coming to a determination whether moral turpitude is involved where there has been a conviction of any

crime (there, assault). In discussing the general language of *United States ex rel. Robinson* v. *Day*, the Court said:

> *'This language means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction* to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean *the charge (indictment), plea, verdict, and sentence.* The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. So construed, there is no inconsistency between that opinion and this; and such is plainly the correct construction because it *is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation*, provided it involves moral turpitude. • • •' (Emphasis added by Judge Barnes.)

See also, *United States* v. *Carrollo*, *supra*, 30 F. Supp. at page 7, point 12, 2d ¶. • • •

> "We need not here come to the question of whether or not any conviction, whether of a crime involving moral turpitude or not, or whether of a felony or a misdemeanor, is a material fact of which the government is entitled to be advised."

The confusion which might be created if we attempt to guess at the law of Italy, guided only by the five codes, can be observed, as we have said, if Your Honors will consult Exhibit No. 38 (App. 229). After petitioner had left Italy and while residing in the United States, a proceeding was taken under which one Felice DeLucia, defaulting, was charged with premeditated voluntary homicide. We quote (App. 230):

> "Moreover it is noted that by Antonio DeLucia's acquittal, by decree rendered by this same Court June

18, 1924 based on the jury finding him not guilty, of the charge of complicity to the homicide through his having instigated his son to commit it on the person of Capasso, the essential element is lacking on whose basis the Grand Jury indicted Felice DeLucia on April 10, 1922, of premeditation in the homicide. One would be convinced of this by merely reading that indictment from which clearly emanates the concept that it was his father's overbearing will that caused Felice DeLucia to do away with Capasso, as he did later on, under the threat of not being let into the house otherwise. *For good reason therefore the Public Prosecutor asked that the circumstance of premeditation be excluded*, and the Court, affirming the responsibility of the accused, under Art. 364 of the Penal Code, is of the opinion that he be punished with the maximum penalty said article provides, in view of the gravity and circumstances of the act which exclude the application of any benefit. • • •

The Court declares Felice DeLucia son of Antonio guilty of voluntary homicide on Vincenzo Capasso *without the qualification of premeditation;* • • • Having read Art. 3 N. 2 & Art. 7 of Royal Decree 1641 of Dec. 22, 1922 Art. 86 of the Pen. Code & 421 of Crim. Procedure Code absolves said Felice DeLucia of the offense of failing to declare arms under the Amnesty granted by said Decree. • • •

By Decree issued Apr. 18, 1940, Penal action in connection with this conviction has, under the statute of limitations, been declared extinct and order of arrest of June 30, 1924, has been revoked. Naples, April 19, 1940" (Italics supplied.)

It will be noted that reference is made to an indictment, which may show lack of moral turpitude. This indictment was suppressed by the Government, as were the indictments in the other two cases, i.e., Ex. 36, Ex. 37 (App. 224, 227). If as the Court of Appeals has said, the Hearing Officer could judge by prevalent standards, that Officer should have been furnished the indictment.

Such implication as was made by the Hearing Officer from the five codes would not be necessarily true in this country, as a person may intentionally kill without guilt. Again we say implications were drawn from a portion of the supposed code. No explanation appears in the record as to the law applicable to the conviction as shown in Exhibit No. 36. As was said by the Chief Justice in *Jordan v. DeGeorge*, 341 U.S. 223, 226:

> "Therefore, our inquiry in this case is narrowed to determining whether this particular offense involves moral turpitude. Whether or not certain other offenses involve moral turpitude is irrelevant and beside the point."

The Hearing Officer undertook to cite the United States authorities to show that the crime of manslaughter has at times in this country been held to include moral turpitude. This comparison leaves out the fact that it was not shown that petitioner was convicted of manslaughter as that term is understood in this country. Without the full record and the law of Italy no one can tell of what anyone was convicted.

Ex. 37 (App. 227) shows:

> "Title of Crime—Attempted Homicide."

This should have warned the Hearing Officer that the word "Homicide" may not mean manslaughter. In this country there is no such crime as assault with intent to commit manslaughter. *People v. Moore*, 146 Ill. 600. The term "Attempted Homicide" would be meaningless, without more as to the law and the indictment.

Your Honors know that in the United States our laws provide for killing without criminal intent, i.e., as in self defense, or in defense of habitation, or as in killing by misadventure. In the absence of proper proof as to just

what the law of Italy might have been and in the absence of proper proof as to the nature of the crime, the Hearing Officer was left to speculate that a crime involving moral turpitude had been involved. Your Honors know that in this country a crime might originally be a serious one as to the charge and reduced in turpitude by a court after the evidence has been heard. See footnote No. 14 to *Ablett* v. *Brownell*, 240 F. 2d 625, 631 for Section 4 of the Act of September 3, 1954, 68 Stat. 1145-1146, 8 U.S.C.A. §1182 (a), concerning crimes in which the punishment was reduced. In an appendix, herein p. 861, we have copied from a text book in re crime involving moral turpitude, conviction *in absentia* and juvenile delinquency.

See also *Calvillo* v. *Robinson*, 271 F. 2d 249, 250. See footnote 341 U.S. 236 for opinion of Attorney General on moral turpitude. The record made before the Hearing Officer left all such matters as to the law and practice of Italy to speculation.

Reference is made in Ex. 38 (App. 231) to the acquittal of one defendant in a previous trial. Without the indictment in evidence as to any of these cases, the Hearing Officer was left to speculate on the legal effect in Italy of this acquittal.

One may kill intentionally under the law in this country without moral turpitude. We do not know about the law of Italy because the Government failed to prove that law, or to make any attempt, in our presence.

The Court of Appeals said, herein p. 849:

> "It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term 'voluntary' indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable."

In *Tseung Chu* v. *Cornell*, 247 F. 2d 929, 934, Judge Barnes said, quoting from *Twentieth Century Fox Film Corp.* v. *Lardner*, 216 F. 2d 844:

> "With respect to crimes and moral turpitude there are three possible classifications:
>
> "1. Those crimes necessarily involving moral turpitude for example, frauds;
>
> 2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;
>
> 3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee. See *In re Hallinan*, 43 Cal. 2d 243, 272 P. 2d 768."

The fact that the sentence was for 2 years, 6 months and 16 days and a pecuniary penalty of 145 lire (App. 225) should have put the Hearing Officer on notice that probably the Italian Officials were dealing with a crime which did not include moral turpitude. From Ex. 39 (App. 234, 237, 238) we observe that a defendant found to have "a partial mental defect" and another declared to be "partially unbalanced mentally at the time" were given reduced sentences because of this condition. This should have warned the Hearing Officer to not rely on inferences to be drawn from records showing a practice different from ours. Here a sentence was imposed on one defendant in his absence, but that sentence was void under our standards. If one negates the possibility of a killing being justifiable that does not negate a killing being without moral turpitude, as for instance a killing in the commission of another.

In *United States* v. *Uhl*, 107 F. 2d 339, it was held that where alien is convicted of crime which does not necessari-

ly involve moral turpitude, deporting officials cannot consider the particular conduct for which the alien has been convicted. Immigration Act of 1917, §19, U.S.C.A. §155. Judge Hand said,

> "It will be observed that the indictment was satisfied by an intent to commit any crime whatever, no matter how morally innocent it might be. Hence, in accordance with the doctrine, which we have several times announced, unless the possession of the jimmy with intent to use it for any crime at all, was 'necessarily,' or 'inherently', immoral, the conviction did not answer the demands of §19 of the act of 1917. *United States ex rel. Mulius* v. *Uhl*, 2 Cir., 210 F. 860; *United States ex rel. Robinson* v. *Day*, 2 Cir., 51 F. 2d 1022; *United States ex rel. Zaffarano* v. *Corsi*, 2 Cir., 63 F. 2d 757."

We repeat from the above quote from the Court of Appeals, herein, p. 849:

> "• • • the fact that a sentence was imposed negates any possibility that the killing was justifiable."

The killing could be not justifiable, yet it could lack moral turpitude. The entry of a sentence in Italy does not have the same legal significance as would a sentence in the United States. An inspection of Ex. 36, 37, 38 and 39 will show many sentences unknown to our law. As we have mentioned, in Ex. 39 (App. 236) it appears that killing by a mental defective was said to have been deliberate with intent to kill. The use of words "*voluntary homicide with grave provocation and carrying a gun, under extenuating circumstances*" should not have been construed to mean the same as voluntary manslaughter as understood in the United States.

Judge Perry said (App. 263), herein p. 843:

> "The fact of petitioner's convictions having been established, it was not within the province of the Spe-

cial Inquiry Officer to inquire into the circumstances surrounding the homicides. It was his duty to determine only whether or not the crimes for which petitioner had been convicted involved moral turpitude, and this he did."

We contend that Judge Perry was in error in assuming that

> "The fact of petitioner's conviction having been established."

As was said in *Browne* v. *Zurbrick*, 45 F. 2d 931, 933, if reference is to be had to the conviction the reference can not stop half way, the full facts show, etc. In *Vidal Planas* v. *London*, 104 F. Supp. 384, 389, Judge Westover looked into the circumstances of a conviction of homicide in Spain and held that it did not involve moral turpitude, because of extenuating circumstances. The cited case of *Mongiori* v. *Karnuth*, 30 F. 2d 825, involves manslaughter in the second degree.

Now if Your Honors will again inspect the five codes appended by the Hearing Officer (App. 125), Your Honors will find nothing about premeditated voluntary homicide, or the right of the Italian Court or the Prosecutor to waive a portion of the charge. With the sort of reasoning employed by the Hearing Officer, it could easily be established that one killing in self defense in Illinois is guilty of murder, merely because our statute on Homicide includes a definition of murder. The phrase "for the purpose of killing" is not found in Exhibit No. 36. The fact that it is found in the five codes means nothing, in the absence of further evidence. We repeat from the opinion of the Hearing Officer (App. 122):

> "The phrase 'for the purpose of killing' necessarily implies that there was an intent and that the act was voluntary."

So we present this confusing picture. Judge LaBuy and the Hearing Officer inquired into the circumstances in order to identify petitioner as the person named in the various documents. Then after the Hearing Officer makes his inquiry, consults the documents and holds that the papers from their content show a crime of moral turpitude, we seek to point to further circumstances to show lack of premeditation, extenuating circumstances and absence of moral turpitude then we are told by Judge Perry that the Hearing Officer should not have looked at the contents of the various exhibits. We are told by the Court of Appeals that it was not necessary for the Hearing Officer to look. The Hearing Officer looked until he found support for his adverse conclusions. Then when we look at the same material in order to point to thy lack of evidence from which to find the fact of conviction of petitioner of a crime involving moral turpitude, we are denied the right to look at the circumstances on which the Administrative officials founded the order of deportation.

How can any one say that from the fact that a sentence was imposed that that, under Italian law, negates that the killing was justifiable? We know from this record Ex. 38 (App. 231) that a sentence was imposed on one Felice DeLucia in 1924. Petitioner was in the United States in 1924. Obviously a sentence under Italian law does not have the same meaning as a sentence here in the United States.

The Hearing Officer failed to notice the difference between voluntary homicide and the record made of the conviction. In *United States* v. *Saccarello*, 200 F. 2nd 540, was held that "moral turpitude" could be determined with out reference to foreign laws. The Immigration Officials and reviewing courts need look only to the record and the inherent nature of the offense. The alien was convicted of forgery and larceny. In *Marcus* v. *Lenoir*, 96 F. 2d 122,

the crime of conspiracy to defraud was involved. In *United States* v. *Corsi*, 63 F. 2nd 757, the indictment was not in the record. The alien admitted and a clerk's certificate showed conviction of assult in the second degree. This crime did not necessarily include "moral turpitude." In *United States* v. *District Director*, 106 F. 2nd 14, Judge Clark said, p. 21:

> "Had the facts pointed to the crime of forgery under American law, the burden of explanation that the German law was otherwise might well be required of the alien, but it does not seem to us that under the circumstances, facts showing an intent to defraud or deceive should be supplied by a mere rule of procedure."

Petitioner asserts that if the Government had proved voluntary homicide as charged in the deportation rule and the law of Italy designated voluntary homicide as a crime including moral turpitude, that would be one thing, but when the record of conviction shows something different than voluntary homicide, as we know it, the very terms of the conviction demonstrate lack of moral turpitude.

It must be kept in mind that the Government under the law, had the burden of proving that petitioner was convicted of a crime involving moral turpitude.

In *Forbes* v. *Brownell*, 149 F. Supp. 848, the Court construed a Canadian statute defining the offense of bigamy. The Court found p. 852:

> "It follows, therefore, that the Exclusion Order entered by the defendant against the plaintiff is grounded on a misapprehension of the inherent nature of the crime of bigamy in Canada and cannot be sustained."

In the case before Your Honors, the Hearing Officer confessed that he had not understood the significance of Exhibit 36 and required resort to the five codes.

If this appeal for help had been accomplished in our presence, the situation may have been quite different. Your Honors are now left to speculate as to what cross examination may have brought forth.

The phrase "crime involving moral turpitude" lacks sufficiently definite standards to justify this deportation proceeding, hence the statute is unconstitutional for vagueness. The alien in *Jordan* v. *DeGeorge*, 341 U.S. 223 raised this objection having been twice convicted in this country for conspiracy to defraud. A divided Court overruled the objection holding that crimes in which fraud is an ingredient have always been regarded as involving moral turpitude. The case at bar does not involve a claim of conviction for fraud. Your Honors are referred to the dissent by Mr. Justice Jackson, p. 232, concurred in by Mr. Justice Black and Mr. Justice Frankfurter. Here will be found an argument adopted by petitioner. In the dissenting opinion Mr. Justice Jackson said, p. 242:

> "A different question might be before us had Congress indicated that the determination by the Board of Immigration Appeals that a crime involves 'moral turpitude' should be given the weight usually attributed to administrative determinations. But that is not the case nor have the courts so construed the statute."

In *Tseung Chu* v. *Cornell*, 247 F. 2d 937, 939 Judge Barnes said:

> "While it is true that Mr. Justice Jackson, who was joined by Mr. Justice Frankfurter, wrote a strong dissent, we feel bound by the language and reasoning of the majority of the Supreme Court."

In considering whether violation of 26 U.S.C.A. §145 (b) involved moral turpitude, Judge Barnes had before him the indictment, the plea and sentence and dealt with a

crime committed in the United States. In contrast the case at bar presents a fragmentary record together with much speculation about the foreign law applicable. We note that a Departmental finding that crimes which alien was convicted involved moral turpitude is not binding in a court. *United States* v. *Tuttle*, 46 F. 2d 342.

At the hearing, as is shown by the record, there had been no indication that the Hearing Officer intended to look up further evidence in our absence. The first knowledge petitioner or his attorney received concerning the use of this illegal evidence was after the deportation order had been entered and the opinion of the Hearing Officer had been received by mail (App. 56). The statute, Title 8 U.S.C.A. §1252 (b), provides for presence. Due process of law is not given when evidence is obtained and used in the absence of a party. We quote two of the sections of the above statute:

> (3) The alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Deportation is a penalty and care must be exercised that procedure employed against aliens meet the essential standards of fairness. *Bridges* v. *Wixon*, 326 U.S. 135:

> "Where right of an alien to remain in the United States is challenged the alien before being deported has right to a 'fair hearing', including the right to be apprised of nature of charge against him and reason for the challenge of his right to remain in the United States, and the right to be confronted with witnesses and to present testimony and have counsel."

Your Honors will note from *Bridges* v. *Wixon*, 326 U.S. 135, 150 that the regulations of the Immigration and Naturalization Service provide that a recorded statement made by any person may be received in evidence:

> "only if the maker of such statement is unavailable or refuses to testify at the warrant hearing."

There was no showing that the author of the statement here was unavailable or refused to testify. Your Honors said, p. 154:

> "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Your Honors held that a hearsay statement had been introduced into evidence in violation of the rules and, p. 152, that the rules were designed to protect the alien and to afford him due process of law. In *United States* v. *Dunton*, 291 F. 905, it was held that documentary evidence not received until after the last hearing could not be considered. *United States* v. *District Director*, 106 F. 2nd 14, 19.

So far in this argument we have followed the Hearing Officer on the wrong track taken by him. The Hearing Officer, with the help of the five codes, undertook to construe the alleged record of conviction. The real question should have been—what information was in the hands of the American Consul and what did that official determine concerning the nature of the crime, if any, committed?

From the failure of the Government to produce the visa and the papers on which the visa was founded, or to account for their absence, Your Honors must conclude that the American Consul was advised of any difficulty petitioner had with the Italian authorities, and the American Consul concluded that the conviction was not for a crime of moral turpitude.

Another real question overlooked is—what information was in the hands of Mr. Beck when he approved of the passport and visa and admitted petitioner?

Also Your Honors must give heed to the judgment of the Naturalization Court finding that petitioner was in fact an alien of good character, who had entered legally and had resided here for the required period. The Hearing Officer paid no attention to the action of the American Consul, the decision of Mr. Beck or the judgment entered by Judge Wilkerson.

In review of the findings, Your Honors will consider the failure on the part of the Government to prove the identity of petitioner in relation to certain alleged documents introduced by the witness Rando. The following is copied from the transcript (App. 98):

> "Mr. Stewart: Now, with reference to the testimony concerning certain documents, gathered by a witness by the name of Rando, I don't dispute that Mr. Rando would testify the same here as he did before Judge LaBuy, so that stipulation stands.
>
> But after Mr. Rando would testify, if he testified here the same as he did in the transcript, there would still remain a gap in the evidence because there is no evidence that Paul DeLucia, who is here at the table, is the same person that is named in the various documents that he (Mr. Rando) produced. That objection is open on the record and I, just as a matter of caution and precaution, don't want it understood that I am agreeing that those exhibits actually refer to Paul DeLucia; and the exhibits, themselves, we can argue from them as to their value after they are in, because it is understood that I am not admitting their materiality."

Your Honors will notice from an examination of the decree that Judge LaBuy did not find as a fact that Mr. Rando or anyone else had identified petitioner.

We quote from Judge Murphy in *People* v. *Casey*, 399 Ill. 374, 378:

> "It would be contrary to the law of what is right and just in a criminal action to hold that the enhanced penalty could be inflicted in the face of an uncertainty as to whether defendant was the same person as the one described in the records offered to prove the former conviction."

In the case at bar, the papers were put in evidence before Judge LaBuy and again before the Hearing Officer, for the purpose of establishing a link in the chain to prove that petitioner was the same person shown in those foreign judgments. The link created by the papers if any, has no value unless Your Honors look to the foreign documents for the family history of the person convicted.

Even if it were proper to look at the contents of the foreign records we would find contradictions. Ex. 36 (App. 224) purports to show a conviction on May 18, 1917, for a crime committed on Emilo Perrillo on July 17, 1915. Ex. 37 (App. 227) purports to show that Felice DeLucia entered prison July 17, 1915, "Title of Crime: Attempted Homicide and serious wounds against Ferrillo Emilo." If the person shown to have been convicted in Ex. 36 (App. 224) ever entered prison on that charge, Mr. Rando has not produced the record or accounted for its absence. Ex. 39 (App. 241) orders the release of Emilia and Antonia DeLucia "having served their respective terms while in prison waiting for trial." Ex. 36 (App. 224) describes Felice DeLucia as 17 in 1917. The Italian Code produced by the Hearing Officer provides (App. 126):

> "If, at the time of sentence the convicted has not as yet completed the age of eighteen, the judge may order that the penalty restricting personal liberty may be served in a correction house: and interdiction from public offices and imposition of special surveillance by the Authority of Public Safety are not applied."

We quote from §637, 32 C. J. S. p. 489:

> "The record is not, however evidence of any matter which can only be inferred from it by argument, and the record may not be introduced to establish the facts on which a judgment was based."

The Hearing Officer used the foreign judgments as evidence of family history and other alleged facts, having no place in a judgment and being hearsay. The law does not permit the building of presumption on presumption. *Smith v. Fidelity & Casualty Co.*, 261 F. 2d 460. As was held in *C. M. St. P. Ry. v. Coogan*, 271 U.S. 472, 477:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstance must be proved, and not themselves presumed."

The Hearing Officer was compelled to look to circumstances in evidence for other presumptions on top of this presumption.

The findings of the Hearing Officer might be summarized as follows:

(a) The Government relies upon a paper purporting to show conviction of one Felice DeLucia.

(b) There is no proof of the identity of the Felice DeLucia as being petitioner.

(c) However, I have compared the disputed paper with other papers, also purporting to refer to one Felice DeLucia.

(d) There is no proof of the identity of the Felice DeLucia named in these other papers as being petitioner.

(e) But, because of the similarity of names and a portion of the family history to be found in the disputed papers, with the name and a portion of the family

history of petitioner, I find that the paper shows a conviction of crime as to petitioner.

(f) In making this comparison I have taken into consideration the name and such other circumstances of description, to be found in the disputed paper, purporting to show a conviction.

Nothing had been proved before Judge LaBuy or before the Hearing Officer to show that the Italian court had jurisdiction of the person of petitioner or the subject matter. Ex. 38 (App. 229) shows on its face that a defendant was convicted in 1924, after the arrival of petitioner in the United States. On the face of Ex. 36 (App. 224) there is nothing to show the presence of the person there said to have been convicted. The Hearing Officer had nothing before him but that previously presented to Judge LaBuy.

On Exhibit 36 Mrs. Iole Mazzolini, certifies that she is officer in charge of the Archives of State in Naples, Italy, having legal custody of the Penal Sentences issued by the Judicial authorities of Naples (App. 225). We have no such office in this country. We might guess and compare this Italian officer to our Keeper of a Warehouse. In the absence of proof of the law of Italy this certification means nothing. *United States* v. *Grabina*, 119 F. 2d 863.

We know that a copy of a sentence in this country would be worthless without more, even if properly certified by the person charged with making and keeping the record. Your Honors must know that in our Criminal Court the State is required to prove the jurisdiction of the Court in proof of a previous record. Also outside of this record, the prosecution is required to introduce a police officer or some other witness, to identify the person on trial as being the one named in the previous record.

Ex. 37 (App. 227), purports to be a prison record. One Felicia De Lucia, age 17, arrested on July 17, 1915 and entered prison on the same day. No law was produced to show that such record is required, or where the information was obtained. It is fair to assume that any prison record would also show the date of discharge of the prisoner. This portion was suppressed by the Government. If this prisoner was in fact petitioner he may have left prison and have gone to France before the date of the conviction on May 18, 1917 in Ex. 36 (App. 224). No prison record or any other evidence was produced to show that the person convicted in Ex. 36 ever entered any prison. This gives rise to the view that if all of the records had been produced they would show that the defendant named in Ex. 36 was not in Naples on May 18, 1917, the day of sentence.

Exhibits 36 and 37 are but hearsay. We quote from 31 C. J. S. §194, p. 930:

> "A statement otherwise objectionable as hearsay does not become competent because it had been reduced to writing. A written statement is equally inadmissible under the rule excluding hearsay evidence where its form is judicial * * * In addition, a written statement is inadmissible as hearsay where the form is official * * * "

In *Esnault-Pelterie* v. *Chance Vought Corporation*, 56 F. 2d 393, affirmed 66 F. 2d 474, the trial judge rejected a foreign record holding that it was a fair assumption that a translator is not the custodian of court records. In the case at bar, the title Keeper of Archives, as we have said, suggests an official who might have charge of a storage place. There is no showing that she had any connection with the courts. The fact that Jole Mazzoleni has signed Exhibit 37 (App. 227) as having charge of the registry

of prisoners of the jail causes one to conclude that these Exhibits were copied from some central store house.

Where a judgment is relied upon as an adjudication on the subject matter or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete record or a duly authenticated copy of the entire proceedings in which the judgment was rendered. (32 C.J.S. §646 p. 511). A public record is not evidence of matters incidently noted therein. (32 C.J.S. §644, p. 509). The record is not however evidence of any matter which can be inferred from it by argument and the record may not be introduced to establish the facts on which a judgment is based (32 C.J.S. §636, p. 489). The judgment will not be recognized where it was arrived at in a mode or manner repugnant to natural justice or where it appears that the defendant was beyond the territorial jurisdiction of the Court. (50 C.J.S. §906, pp. 544, 545). A foreign judgment in a criminal case is not *res judicata* or proof of the facts adjudicated in a subsequent civil action based upon the same facts. (50 C.J.S. §906, p. 546).

In the case at bar, there was no proof that the court was one of general jurisdiction. Where it does not affirmatively appear of record that the judgment was rendered by a court of general jurisdiction, the burden of proving that the foreign court had the requisite jurisdiction is on one relying upon the judgment. (C.J.S. §906, p. 545). There was no direct evidence that the defendant in the case at bar was also the defendant in the foreign judgments. The Hearing Officer should have mistrusted the evidence introduced by the Government as soon as it could be observed that the Government had suppressed evidence. Mr. Rando never claimed that he had produced for inspection all of the records obtained by him. When we notice from Ex.

37 (App. 227) that one Felice DeLucia, age 17, entered prison on July 17, 1915 for the crime of Attempted Homicide and serious wounds against Ferrillo Emilo and that Ex. 36 (App. 224) shows a conviction of May 18, 1917, we are left to guess that Ex. 37 and Ex. 36 refer to two different cases. Where is the record of Felice DeLucia entering prison on or after May 18, 1917? Was the sentence suspended or did the defendant enter some reformatory? Or had petitioner left Italy for France before May 18, 1917? The Hearing Officer should have concluded that there was no evidence on the subject because the absent evidence would have contradicted the theory of the Government.

When Judge LaBuy decided that petitioner had not truthfully answered a question about an arrest, all Judge LaBuy was required to look for in the various exhibits was evidence that petitioner had in fact been arrested in Italy. It was not necessary for Judge LaBuy to find that petitioner had been convicted. On the other hand, it was necessary for the Hearing Officer to find that petitioner had been convicted. The evidence heretofore considered by Judge LaBuy was deficient to prove conviction. The Hearing Officer endeavored to patch up this deficiency by resort to evidence taken in our absence and failed to fill the gaps in proof.

Motion Pursuant to Rule 60(b).

At the Administrative hearing (App. 86), petitioner admitted that he was not a citizen, with a reservation to the effect that petitioner intended to move to vacate the LaBuy decree. In view of the fact that that decree has been affirmed, herein p. 813, it was necessary to apply to the Court of Appeals for leave, herein p. 865. Leave has

been denied, herein p. 871. In affirming Judge LaBuy, herein p. 818, 819, Judge Schnackenberg said:

> "While the court did not expressly indicate what it meant by the words *'the concealment of other material facts'*, it is apparent to us from the context of the memorandum that the court had in mind DeLucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum. . . .
>
> "More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization *was illegally and fraudulently procured*, the latter was not res judicata of issues presented in the denaturalization proceeding." (Italics supplied).

We respectfully contend that the Court of Appeals, instead of interjecting words not used by Judge LaBuy, should have sent the case back for findings Judge LaBuy might have made. In *Johnson* v. *United States*, 256 F. 2nd. 849, after noting the insufficiency of the findings made by the District Court, the Court of Appeals, instead of remanding for fact findings, awarded a new trial. Now that the opinion of the Court of Appeals has become a closed book, petitioner seeks relief by virtue of Rule 60(b). The doctrine of collateral estoppel is inapplicable in litigation where decisions of this Honorable Court intervene between the earlier and later litigation to change the applicable principles. *Commissioner* v. *Sunnen*, 333 U.S. 591.

As was said by Mr. Justice Brennan, dissenting in *Polites* v. *United States*, 364 U.S. 426, 439:

> "The United States in this case seeks to distinguish that decision by asserting that there 'the continuing force of the decree derives from facts fully accrued and litigated in the original judgment' True enough; but here, as in *McGrath* (339 U.S. 33) although the

facts were fully accrued at the time of the decree and have not changed, the law has (so petitioner asserts) radically changed, and in that situation it is unjust to give the judgment prospective effect."

The change in the law, or clarification, as to the case at bar is to be found in a number of cases, including *James* v. *United States*, 366 U.S. 223. If Judge LaBuy or the Court of Appeals had had the benefit of the *James* case, it might have been decided that petitioner should have been judged by the law as it stood in 1928, when petitioner made answer to the following questions (App. 211)

> 24. Have you ever been arrested? No. Have you ever been charged with a violation of the prohibition law or any other law of the United States, or State, or any city ordinance? No. If so, give particulars.

The above questions were preceded by the following (App. 211)

> 22. If necessary, are you willing to take up arms in defense of this country? Yes.
>
> 23. Did you file a questionnaire with a draft board during the war? If so, answer the following: Date filled in ..... Address at that time ..... Address of draft board ..... Board division No. ..... Your order No. ..... Your serial No. ..... Class in which you were placed ..... Division ..... Date of Classification ..... Did you claim exemption because you were an alien? ..... For any other reason? ..... Why? .....

Cf. *Nowak* v. *United States*, 356 U.S. 660, *Maisenberg* v. *United States*, 356 U.S. 670. In *United States* v. *Tuteur*, 215 F. 2nd 415, 417 Judge Schnackenberg said:

> "In a naturalization proceeding the court, before it can enter an order for naturalization, must find as a matter of fact first, that certain indispensable legal

requirements for naturalization have been fulfilled and, secondly, if such requirements have been fulfilled, whether the applicant for citizenship should be granted naturalization in view of his beliefs, background, etc. As to the requirements in the first class, if compliance therewith does not exist, an order of naturalization is subject to revocation on the ground of illegal procurement regardless of whether it was based upon false statements given by the applicant intentionally or unintentionally. As to the court's exercise of its discretion, in the second class, in order to set aside an order of naturalization on the ground of fraud because of false testimony given by the applicant to influence the court in its action, it is necessary for the government to prove that the said testimony of the applicant was intentionally false. In other words, the government in the latter situation must allege and prove fraud, in which an essential element is intent.

(4). In the petition in this case the allegations in reference to false statements alleged to have been made by respondent fall in the second class. To be actionable they must be connected directly with allegations of intent on his part to deceive."

The denaturalization case against Tuteur was brought before Congress shifted ground, as the shift was pointed out in *United States* v. *Stromberg*, 227 F. 2nd 903, 905. So illegal procurement is no longer a ground for denaturalization. Judge Schnackenberg interjected fraud into petitioner's case, which interjection has no basis in the record. Petitioner seeks the right to return to the District Court for a decision as to whether fraud has been proved, in the light of the *James* case. It is contended that there is not enough evidence to prove an intent to deceive on a material matter. Leaving aside the probable understanding that petitioner believed the question was directed to possible arrests in this country, petitioner had a right to assume that after he had passed inspection and five years

had elapsed, he had acquired lawful residence and it did not matter to the United States officials what may have happened in Italy. We quote from the testimony of Mr. Durisch (App. 141, 145):

> "Then the examiner proceeded to take the assertions in the application and using the same language he could question the applicant as to the various items of fact alleged all the way through and as to the assertions that were needed for petition. It was customary to check opposite those assertions * * *
>
> "The top date, August 10th, 1920, on his brief, and under the formalized style, would indicate the date the naturalization petitioner arrived in the United States and indicates continuous residence from the date of arrival up to the date of examination."

We contend that the entire testimony of Jordan and Durisch supports a conclusion that no one considered any trouble in Italy as material "to the assertions that were needed for petition."

Your Honors will find that the case of *United States* v. *Profaci*, 274 F. 2nd 289, contains much to be applied in the case at bar. We quote, p. 292:

> "Even if it were sufficiently proved that Profaci was specifically asked 'Were you ever arrested?' the Government's proof does not convincingly demonstrate that the defendant actually understood the question to refer to arrests outside the United States, and especially to those preceding his hearing by more than five years. Such proof, we hold, was essential, cf. *United States* v. *Rossi*, 2 Cir., 182 F. 2d 292, since illegal procurement as a ground for revocation of citizenship had been eliminated by the 1952 Act. *United States* v. *Stromberg*, 5 Cir., 227 F. 2d 903. * * * It seems plain to us that the arrest question allegedly put to Profaci contained greater ambiguity than that present in the question which the Supreme Court dis-

cussed in *Nowak v. United States, supra* (356 U.S. 660; 78 S.Ct. 957) * * * We hold that the Government has with the requisite degree of certainty, neither convincingly established the content of the question put to Profaci nor, accepting the Government's position on this issue, filled the gap in its proof as to the defendant's understanding and knowing falsification of the question asked. *Nowak v. United States, supra; United States v. Meli, supra;* (158 F. Supp. 21, affirmed 265 F. 2nd 222.)"

In considering our application under Rule 60(b), please keep in mind that *Nowak* v. *United States*, 356 U.S. 660 and *James* v. *United States*, 366 U.S. 223, were decided after the LaBuy decree was rendered. As was said in our suggestions made to the Court of Appeals, herein p. 866:

> 3. If the said decree were set aside, DeLucia would cease to be subject to the jurisdiction of the Administrative body and therefore the deportation order would be void.
>
> 4. A petition filed pursuant to Rule 60(b) might restore jurisdiction in the District Court in order that findings of fact and conclusions of law might be made defining the jurisdiction of the District Court. The subsequent deportation proceedings have made it necessary to have a clearer statement of what was intended by the decree entered by Judge LaBuy.

In *McKay* v. *McAlexander*, 268 F. 2d 35, 39, Judge Hamley said that evidence showing an inaccuracy in declaration of residence in Naturalization proceedings is insufficient to impeach a decree, citing, *In re McCoppin*, Fed. Cas. No. 8, 713, 5 Sawy 630; Van Dyne, Citizenship of the United States (1904) p. 108.

The difference between the presence and absence of fraud may very well spell the difference between a can-

cellation as of 1957 and a cancellation dated back to 1928. It must be remembered that Judge Schnackenberg has held, herein p. 851, that Judge LaBuy nullified the naturalization proceedings. A finding of fraud was no doubt thought to be a necessary foundation for this decision. Judge LaBuy did not find fraud. Petitioner seeks an opportunity to have Judge LaBuy to say that no fraud was proven and that the District Judge did not undertake to nullify all that took place before Judge Wilkerson.

Costello v. *United States*, 365 U.S. 265 can be distinguished on the ground that Costello was answering as to the five years period of probation, but it may be noted that Mr. Justice Douglas said, dissenting, p. 289:

> "Petitioner answered truthfully when he listed 'real estate' as his 'occupation.' He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government. We could not do so and be true to the strict standard exacted from the Government by *Schneiderman* v. *United States*, 320 U.S. 118, 122-123."

In the case at bar, petitioner answered truthfully when he answered No. But he may not have answered truthfully if the answer is to be taken to embrace that which everyone may have considered immaterial.

As was said by Judge Goodman in *Benvenuto* v. *Barber*, 157 F. Supp. 575, 578:

> "A wrong answer, if given, is not automatically synonymous with a fraudulent answer."

As was said in *Johannessen* v. *United States*, 225 U.S. 227, 242:

> "The act makes nothing fraudulent or unlawful that was honest and lawful when it was done."

As is shown by the record, petitioner is married and has become the father of three children born here. For him, deportation is banishment. Doubts in statutory construction are to be resolved in his favor. *Fong Haw Tan* v. *Phelan*, 333 U.S. 10. Before petitioner is torn away from his wife and children and deprived of all that makes life worth living, we trust that Your Honors will agree that the mandate for his banishment should be clear and unequivocal. We respectfully request careful consideration of the many errors assigned and urge that the decision below be reversed. As to Rule 60 (b), we request application of the power of this Honorable Court to supervise and to see that justice is done.

Prayer for Writ.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit, that the judgment in the deportation case be reversed. Also that a writ be issued in the matter of petitioner's motion for leave to file his petition pursuant to Rule 60(b) Federal Rules of Civil Procedure and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

PAUL DELUCIA

By WM. SCOTT STEWART
Counsel for Petitioner

APPENDIX A

Opinion by Judge LaBuy reported in United States v. De Lucia, 163 F. Supp. 36

The complaint in the above cause filed October 10, 1956 prays for the cancellation of a certificate of naturalization granted September 27, 1928 to Paul DeLucia for the reason that it was procured by concealment of material facts and by wilful misrepresentation.

During the course of the trial the court reserved its ruling on defendant's objections to the admissibility of several exhibits. The court overrules these objections and these exhibits are received in evidence.

The only evidence in the case is that presented by the plaintiff. The government introduced twenty-two witnesses and approximately seventy documents and charts. The defendant, although present in the courtroom throughout the trial, offered no evidence on his own behalf. He previously invoked the protection of the Fifth Amendment and has refused to obey the court's order requiring him to respond to questions asked at his deposition. The sole information which this defendant has given is that he is Paul DeLucia and resides at 1515 Bonnie Brae, River Forest, Illinois.

Two deputy minute clerks identified this defendant as having appeared before them and saw him sign the name Paul DeLucia on appearance bonds involving other matters. (Exs. 25, 26.) A United States deputy marshal also identified the defendant as having been fingerprinted in the Marshal's office in this city and that the defendant affixed his signature as Paul DeLucia. (Exs. 24A, 24B, 24C.)

The first basic issue which the government must prove is that this defendant, Paul DeLucia, is the same Paul DeLucia who was granted a Certificate of Naturalization in September 1928.

To this end the government's evidence consists of the testimony of Michael J. Fish, who identified this defendant as the same person for whom he appeared and signed as a witness during the naturalization hearings preceding the granting of the certificate. Mr. Fish testified that at that time he was employed as a staff photographer for the Chicago Tribune; that at that time Paul DeLucia was a restaurant manager; and that he did not know the defendant used the name Paul Maglio. He further testified that the other witness to the proceedings was Frank Meo, whom he believed to be now deceased.

Supplementing this testimony, the government presented documents relating to the naturalization proceedings. They consist of a Petition for Naturalization dated April 10, 1928 (Ex. 1); Preliminary Form for Petition for Naturalization, dated February 21, 1928 (Ex. 2); Declaration of Intention, dated January 9, 1925 (Ex. 4); Certificate of Naturalization dated September 27, 1928 (Ex. 5); and ship's manifest for the vessel SS Ryndam (Ex. 7). A perusal of these documents gives the following information: Paul Maglio arrived at the Port of New York from Boulogne, France on August 10, 1920 on the vessel Ryndam and was coming to a person named Gennaro Calabrese; that his occupation was restaurant manager; that he was born in Apricena, Italy on July 10, 1898 and his mother's maiden name was Nunzia Maria Torelli; that he used another name which was "Paul DeLucia" because he "got married on that name" and desired that his name be changed to Paul DeLucia; that he was married January 3, 1927 and his wife's name was Nancy, born October

2, 1905 in Naples, Italy and that he had a daughter, Mariana, born in Chicago; that he resided at 905 South Halsted Street, Chicago; that he had never been arrested and that he expected to use as witnesses Frank Meo, proprietor of a cigar store at 905 South Halsted Street, and Michael J. Fish, staff photographer for the Chicago Tribune residing at 4920 Monroe Street. The certificate of naturalization was granted to Paul DeLucia whose name was changed from Paul Maglio. Said certificate is signed "Paul DeLucia"; all the other documents being signed "Paul Maglio."

A handwriting expert testified and made a comparison of the signature of Paul DeLucia appearing on the Certificate of Naturalization with the known signatures of this defendant affixed before the two deputy minute clerks and the United States deputy marshal. (Ex. 51.) It was his conclusion that the signature was made by the same person. It was further his conclusion that the signatures of Paul Maglio appearing on the Petition for Naturalization, Declaration of Intention, Preliminary Form for Petition for Naturalization, and Naturalization Form #2328 (Ex. 3), and the signature of Paul DeLucia appearing on the certificate were made by the same person.

In addition, the government has submitted documentary evidence to show that this defendant has a wife named Nancy Emily Gigante, born October 2, 1906 or 1905 in Naples, Italy, who resides at the same address as this defendant, 1515 Bonnie Brae, River Forest, Illinois, and whose old addresses were the same as this defendant's. (Exs. 17A, 17C, 17D, 17E, 19A, 19C, 19G, and 19I through L, 20B through D, 21A and 21B.) Nancy Emily DeLucia had three children named Mary, Anthony, and Paul Jr., and this defendant had three children named Mary Anna, Anthony Paul, and Paul Richard. (Exs. 17E, 21F.)

It is the court's conclusion that this evidence clearly established that this defendant is the Paul DeLucia to whom a Certificate of Naturalization was granted September 27, 1928; and that this defendant, Paul DeLucia, used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization.

The next basic issue which the government must prove is that this defendant falsely assumed the name of Paul Maglio when he applied for his naturalization.

In this connection, a witness, Paul Maglio, not the defendant in this case, testified that his mother's maiden name was Nunzia Maria Torelli and his father's name was Enrico; that he was born in Apricena, Italy on July 10, 1898; that he had five sisters all born in Apricena, four of whom were living named Adele, born 1890; Rosa, born 1893, Angiola, born 1895, and Elvira, born 1900; that his father died in 1924 at the age of 70 and his mother in 1940 at the age of 75. This witness stated he left Italy on July 23, 1920 and arrived in the United States on August 3, 1920. He stated that the population of Apricena at that time was approximately 6000; that he had always lived in this town except for a short period of military service and until he left for the United States; that his occupation while in Apricena was a Clerk and Registrar in the City Hall and that his duties were to keep a record of all births and deaths; that there was no other "Maglio" family residing in Apricena, Italy than his own when he lived there; that there was no other Enrico Maglio in Apricena other than his father, nor was there any other Nunzia Maria Torelli other than his mother. He identified the records pertaining to his family which the government presented, as well as his own passport and citizenship papers. Government's Exhibit 14P is an attestation that no record of the birth of Paolo Maglio exists in Apri-

cena other than that of Paolo Maglio born July 10, 1898, son of Enrico and Nunzia Maria Torelli. This witness, Paul Maglio, was requested to view the defendant, Paul DeLucia, and testified that this defendant was not his uncle, father, cousin or related to him in any way and that he had never seen him before in his life.

Alfonso Torelli, a cousin of the witness, Paul Maglio and a nephew of the witness's mother, corroborated the testimony of Paul Maglio and upon viewing the defendant stated he had never seen this man before in his life.

The court is of the opinion that the government has conclusively shown that the defendant, Paul DeLucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court.

The next issue which presents itself is whether Paul DeLucia is in truth and fact Felice DeLucia.

The government's evidence on this phase of the case consists of the testimony of Special Agent Philip Dunne and a number of documents, which may be grouped into two divisions: (1) information which had been voluntarily supplied by this defendant which is inconsistent with his identity as Paul Maglio and consistent with an identity as Felice DeLucia; and (2) the family history of Felice DeLucia.

In the first division of exhibits, a marriage register dated January 30, 1927, kept in the Holy Guardian Angel Church in Chicago, shows that Paolo di Lucia, age 29 years from Naples, son of Anthony and Mary Annunziata was married to Annunziata Gigante, 21 years old, daughter of Ciro and Anna Porzio. (Exs. 18, 18A.) Nancy Emily

DeLucia, wife of Paul DeLucia, had parents whose names were Anna and Ciro Gigante; her maiden name was Annunziata Gigante, and she was born October 2, 1905 in Naples, Italy. (Exs. 17E, 17G, 20D.)

On September 8, 1927 Paul DeLucia executed a signature card for the First National Bank of Chicago indicating his address was 917 Blue Island Avenue, that he was born in Naples, Italy on November 14, 1897 and that his mother's maiden name was Maria Annunziata. (Ex. 20A.) Exhibits 20B and 20C show that in 1931 Nancy DeLucia resided at 917 Blue Island Avenue. The signature of Paul DeLucia was examined by the handwriting expert against the known signatures of this defendant made on the United States Marshal's fingerprint cards. It was his conclusion that these signatures were made by the same person.

Two applications for beneficial membership in the Italo-American Union dated November 25, 1932 (Ex. 22A) and January 15, 1934 (Ex. 22B) were introduced. The applicant signed his name as Paul DeLucia, indicated he was born in Naples, Italy on the "?" day of July, 1898; that he was married and his beneficiary was to be his wife Nancy E. DeLucia; that his father and mother were deceased at the ages of 65 and 40 respectively; that he had no brothers and had four sisters, ages 26 to 32 (Ex. 22A) and 27 to 33 (Ex. 22B). On November 22, 1935 Paul DeLucia, age 37, 5300 West Jackson Boulevard, owner of the Playhouse Theatre applied for insurance in the Northwestern National Life Insurance Company (Ex. 21C). On that application he stated he was born in Naples, Italy on November 14, 1898, which was later corrected to November 14, 1897. It shows he had a daughter named Mary Anna and a son, Anthony P. DeLucia. In connection with that application Paul DeLucia gave certain answers to the

medical examiner on the same day indicating date of birth to be November 14, 1898, that his father died in 1924 and his mother in 1918. (Ex. 22E.) On December 17, 1938 Paul DeLucia applied to the Equitable Life Assurance Society for a retirement annuity wherein he stated he was born in Italy on November 14, 1897, was married, lived at 5300 West Jackson Boulevard, and his occupation was World Playhouse. (Ex. 23A.) In a letter to the Equitable on January 20, 1939 he advised that he was born in Italy on November 14, 1897. (Ex. 23D.) On November 25, 1941 Paul DeLucia made certain answers to the medical examiner in connection with application for insurance in Northwestern Mutual Life Insurance Company indicating his date of birth to be November 14, 1897, that his father and mother were deceased at the ages of 53 and 39 respectively, that he had no brothers, and had four sisters, ages 36 to 42. (Ex. 21D.)

The handwriting expert made comparisons of these signatures with the known signatures of Paul DeLucia, and, with one exception, testified that the signatures had been written by the same person.

Special Agent Philip Dunne testified to a conversation had with this defendant on October 1, 1947 in the office of the Federal Bureau of Investigation. He testified that the defendant stated his name to be Paul Maglio, born in Apricena, Italy on July 10, 1898; that his parents were deceased, but he had four sisters residing in Italy whose names were Emily, Anna, Clementina, and Louisa ages 41 to 47; that he married Nancy Annunziata Gigante on January 30, 1927, and had three children Mariana, Anthony Paul and Paul Richard; that in the early thirties he lived at or about 5300 West Jackson Boulevard, and in the early forties bought a farm near Joliet, Illinois.

From this evidence it appears that the defendant voluntarily has given the following information which is inconsistent with his identity as Paul Maglio; that he was born in Naples, Italy on November 14, 1897, that his parents were Anthony and Mary or Maria Annunziata, that he had four sisters whose names were Emily, Anna, Clementina, and Louisa whose ages in 1947 were from 41 to 47 years.

The government has presented in the next division of exhibits documentary evidence that one Felice DeLucia was born in Naples, Italy, on November 14, 1897, whose parents were Antonio and Maria Annunziata (Ex. 28), whose children were a son; Felice, born in Naples, and four daughters born in Ottaviano, Italy, named Emilia Beatrice, born 1898, Anna Clementina, born 1901, Clementina Eleonora, born 1905, and Luise Maria, born in 1907. (Exs. 29, 33A, through D.) Exhibit 42 shows that there was only one Felice DeLucia whose birth was registered on November 14, 1897 in Naples, Italy, and whose parents were Antonio and Maria Annunziata. Exhibits 14M and 14N show there was no birth certificate for a Paolo Maglio, son of Enrico and Maria Torelli, either in Naples or Ottaviano, Italy, or for a Felice DeLucia in Apricena or Ottaviano, Italy. (Exs. 40, 43.) Felice DeLucia's father died at the age of 55 in January 1925 (Ex. 31A) and his mother at the age of 44 in May 1917 (Ex. 31B).

Government exhibits 36, 37 and 38 are official documents showing that Felice DeLucia, son of Antonio and Maria Annunziata, born November 14, 1897 in Naples was convicted in 1917 of the voluntary homicide of Emilio Perillo, and in 1920 of Vincenzo Capasso. Exhibit 39 is a record showing that Antonio DeLucia, was charged with others for the homicide of Raffaele Perillo on July 1920 and with giving assistance to the "premeditated homicide on the person of Vincenzo Capasso, by causing culprit Felice

DeLucia, his absconding son, to make up his mind to commit it."

The court is of the opinion that the foregoing evidence clearly establishes that Paul DeLucia and Felice DeLucia are one and the same person.

The use of an assumed name to gain entry into the United States, or such use in the filing of a Declaration of Intention has been held sufficient grounds for revocation of a naturalization certificate, unless it is shown that this name had been one assumed and used prior to entry into the United States. *United States* v. *Goldstein* (D.C.N.Y., 1939), 30 F. Supp. 771; *United States* v. *Shapiro* (D.C. Calif., 1943), 43 F. Supp. 928; *United States* v. *Perez* (D.C. N.Y., 1939), 29 F. Supp. 888; *United States* v. *Marino* (D.C.N.Y., 1939), 27 F. Supp. 155; *Fink* v. *Reimer* (C.A. 2, 1938), 96 F. (2d) 217; *Landon* v. *Clerk* (C.A. 1, 1957), 239 F. (2d) 632. Cf. *United States ex rel. Liebowitz* v. *Schlotfeldt* (C.A. 7, 1939), 94 F. (2d) 263. The fact that an applicant fails to reveal his criminal record is also grounds for cancellation of a naturalization certificate. *Corrado* v. *United States* (C.A. 6, 1955), 227 F. (2d) 780; *United States* v. *Montalbano* (C.A. 3, 1957), 236 F. (2d) 757; *United States* v. *Ascher* (C.A. 2, 1945), 147 F. (2d) 544; *United States* v. *Accardo* (C.A. 3, 1951), 208 F. (2d) 630; *Stevens* v. *United States* (C.A. 7, 1951), 190 F. (2d) 880.

In *Corrado* v. *United States*, *supra*, the court stated:

> "• • • How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts

> the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. * * * "

In *United States* v. *Mantalbano*, *supra*, the court said:

> "* * * The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings, without fear of consequences so long as the truth, had it been revealed would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires. * * * "

See also *United States ex rel. Volpe* v. *Smith* (C.A. 7, 1933), 62 F. (2d) 808, 812.

In an application for citizenship it is indispensable that true identity be disclosed. The unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The defendant was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf. His failure to testify or present any evidence may justly give rise to the inference that he was not in a position to combat or explain away the government's evidence. *Mammoth Oil Co.* v. *United States* (1927), 275 U.S. 13, 52; *Local 167 of I. B. of Teamsters* v. *United States* (1934), 291 U.S. 293; *Bilokumsky* v. *Tod* (1923), 263 U.S. 149; *Vajtauer* v. *Commissioner* (1927), 273 U.S.

193; *Runkle* v. *Burnham* (1894), 153 U.S. 216; *Kirby* v. *Tallmadge* (1896), 160 U.S. 379; *Northern Ry. Co.* v. *Page* (1927), 274 U.S. 65; *United States* v. *Robertson* (C.A. 5, 1956), 233 F. (2d) 517; *Bandel* v. *United States* (C.A. 5, 1956), 234 F. (2d) 102; *United States* v. *Nowak* (D.C. Mich., 1955), 133 F. Supp. 191, 196.

Defendant urges that the unexplained failure of the government to present the testimony of the Designated Examiner conducting the hearing on Paul DeLucia's application is tantamount to a conclusion that his testimony, if he were called, would not sustain the contention of the government that Paul DeLucia had falsified his application for naturalization. In fact, the defendant contends that the entire evidence fails to show that this defendant "hid anything from the naturalization examiner." As shown by the testimony of Stephen Durisch and the deposition of Andrew Jordan, George Mackay was identified as the Designated Examiner in the proceedings involving Paul DeLucia. Mackay was not called upon to testify. The government explains this omission by submitting with its reply brief a Certificate of Death showing the decease of George Mackay.

Stephen Durisch and Andrew Jordan, both long time employees of the Immigration and Naturalization service, who served on occasion as Designated Examiners, testified to the usual and customary mode of processing and examining applicants for citizenship. Their testimony to the effect that this petition of Paul DeLucia was processed in the customary way leads the court to the conclusion that this defendant had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the Naturalization Office.

The court holds that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him. This memorandum shall constitute the Findings of Fact and Conclusions of Law. Government counsel should present an appropriate decree within ten (10) days from date hereof.

The government's motion for a rule to show cause why this defendant should not be punished for contempt of within which to answer.
court is allowed and the defendant is given ten (10) days

Opinion of Court of Appeals in Denaturalization Case reported in De Lucia v. United States, 256 F. 2nd 487

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* In a denaturalization proceeding in which §340 (a) of the Immigration and Naturalization Act of 1952[1] was invoked to sustain the jurisdiction of the district court, a decree was entered on June 11, 1957, revoking, setting aside and making void an order of said court, entered September 27, 1928, admitting Paul De Lucia, also known as Felice De Lucia, to citizenship. From that decree De Lucia has appealed.

In the denaturalization proceeding, appellee, sometimes hereinafter referred to as the government, filed its com- hereinafter referred to as the government, filed its complaint on October 10, 1956 against De Lucia, and there was attached thereto an affidavit by Charles Gordon, Regional Counsel for the Northwest Region, Immigration and Naturalization Service, United States Department of Justice, dated August 9, 1956, as required by said § 340 (a). In his affidavit Gordon deposed and said that, as said Regional Counsel, he had access to the official records of said Service, "from which the following facts appear: • • •." There follows a recital of pertinent facts as to De Lucia.

Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under the pretense that it shows good cause, affiant's assertions therein are not dependent upon his knowledge, and that, although

[1] U.S.C.A. 1451 (a)

he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his "opinion as to what may be shown by some files."

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, ... U.S. .....[2] In

The complaint alleged that on or about April 10, 1928, pursuant to the Immigration and Naturalization Act of June 29, 1906, De Lucia, who was born in Naples, Italy, on or about November 14, 1897, filed in the court below a petition for naturalization in the name of Paul Maglio, and therein prayed that his name be changed to Paul De Lucia; that on September 27, 1928 that court admitted him to citizenship.

The complaint further alleged that in his declaration of intention dated January 9, 1925, attached to and made a part of his petition, De Lucia alleged under oath that his name was Paul Maglio and that he had been born in Apricena, Italy on July 10, 1898; that in the preliminary form of the petition for naturalization dated February 21, 1928 he stated that his full, true and correct name was Paul Maglio; that he had used the name of Paul De Lucia because he "got married on that name"; that his mother's name was Torelli Nunzia Maria; that he was born July 10, 1898, in Apricena, Italy; that he arrived in the United States at New York August 10, 1920, on the SS Ryndam; and that he further alleged under oath that he had never been arrested.

The complaint further alleged that De Lucia, in his petition for naturalization aforesaid, alleged under oath that

---

[2] No. 72, October term, 1957, decided May 26, 1958. In accordance with that decision, we hold the Gordon affidavit sufficient.

his name was Paul Maglio; that he was born on July 10, 1898 in Apricena, Italy; that he had arrived in New York at the port of New York City on August 10, 1920 on the vessel Ryndam.

The complaint charged further that the aforesaid allegations of De Lucia were false and known by him to be false in the following particulars:

(I) His name was Felice De Lucia and not Paul Maglio;

(II) He was born November 14, 1897 in Naples, Italy and not on July 10, 1898 in Apricena, Italy;

(III) His mother's name was Maria Annunziata and not Torelli Nunzia Maria;

(IV) He had been arrested and convicted of voluntary homicide under his true name of Felice De Lucia on May 18, 1917 in Naples, Italy;

(V) De Lucia's entry into the United States at New York City on August 12 (*sic*) 1920 was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.

The complaint further charged that De Lucia assumed the identity of Paul Maglio in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the naturalization court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy; and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

The complaint further charged that the Immigration and Naturalization Service, relying upon the foregoing false

and fraudulent representations by De Lucia, did issue a certificate of arrival in the name of Paul Maglio, which De Lucia appended to his petition for naturalization; that the concealments and misrepresentations of De Lucia heretofore set forth were deliberately, wilfully and intentionally made in the proceedings leading to his naturalization in order to deceive the naturalization examiners and the court, and further to conceal material facts from them by failing to reveal his true identity and his record of criminality prior to entering the United States; that the concealments were further made to conceal his lack of good moral character and the defendant's lack of attachment to the principles of the Constitution of the United States, to prevent the making of a full and proper investigation of his qualifications for citizenship, to induce the Immigration and Naturalization Service to rely upon the false representations and concealment of the material facts, to make the unconditional recommendation to the court that his petition for naturalization be granted, and, further, to preclude inquiry by the court concerning his qualifications and eligibility for citizenship and to procure naturalization in violation of the law; that the naturalization of the said Paul De Lucia formerly known as Felice De Lucia was procured by concealment of material facts and by wilful misrepresentation, in that he deliberately and intentionally made false statements in the proceedings leading to his naturalization as set forth above.

The complaint prayed for a decree revoking and setting aside the order of the court admitting De Lucia to citizenship, and for general relief.

Defendant filed an answer denying every allegation in the complaint.

Following a trial before the court, the trial judge filed a memorandum which was ordered to constitute findings

of fact and conclusions of law. De Lucia's motion for a new trial was overruled and the decree of denaturalization, from which this appeal is taken, was entered.

To establish its case the government introduced evidence, consisting of documentary exhibits, the oral testimony of various witnesses and the deposition of another. De Lucia offered no evidence.

In its memorandum, after a detailed recital of the relevant evidence, the court found (1) that defendant is the Paul De Lucia to whom a certificate of naturalization was granted September 27, 1928 and that he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; (2) that the government has conclusively shown that the defendant, Paul De Lucia, was not Paul Maglio, born July 10, 1898 in Apricena, Italy; (3) that he falsely assumed the name of Paul Maglio to enter this country; (4) that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and (5) thereby committed a fraud on the court, and also (6) that the evidence clearly establishes that Paul De Lucia and Felice De Lucia are one and the same person. The court further found (7) that in an application for citizenship it is indispensable that true identity be disclosed, and (8) that the unexplained use of an assumed name by this defendant thwarted investigation as to his eligibility for United States citizenship.

The court pointed out that De Lucia was present in the courtroom throughout the trial and had opportunity to present evidence on his own behalf.

The court stated as a conclusion that De Lucia had not disclosed to the Designated Examiner all the facts material to his application for citizenship and that such failure and misrepresentation foreclosed any further inquiry on the part of the naturalization office.

The court held that the use of De Lucia of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him.

While the court did not expressly indicate what it meant by the words "the concealment of other material facts", it is apparent to us from the context of the memorandum that the court had in mind De Lucia's failure to reveal his convictions for homicides in Italy prior to his coming to this country, to which the court had referred in its memorandum.

We are aware that, when the government seeks to deprive a naturalized citizen of his citizenship, it has a burden which must be met with evidence of a clear and convincing character. *Schneiderman* v. *United States*, 320 U.S. 118, 123. From our examination of the record in this case we are convinced that the government has here met its burden. The district court's findings of fact are fully supported by the evidence and, therefore, we are bound by those findings.

Its conclusions of law and the decree which it entered find ample support in the decided federal cases.

The use by an alien of an assumed name to gain entry into the United States, is ground for deportation. *Landon* v. *Clarke*, 239 F. 2d 631, unless satisfactorily explained, *United States* v. *Schlotfeldt*, 94 F. 2d 263. No attempt to explain such use is made in this case. Such use, in attaining citizenship, by naturalization, is sufficient ground for revocation thereof, inasmuch as concealment of one's true name is an effective impediment to an investigation or inquiry relative to the person involved. Had De Lucia used his own name at all relevant times, a path of inquiry leading to his criminal record would have been opened to the government.

The fact that an applicant for citizenship conceals from the government his criminal record is a ground for refusing naturalization, *Stevens* v. *United States*, 190 F. 2d 880, or for ordering denaturalization, *United States* v. *Asher*, 147 F. 2d 544; *United States* v. *Mantalbano*, 236 F. 2d 757; *Corrado* v. *United States*, 227 F. 2d 780; *United States* v. *Accardo*, 208 F. 2d 632, adopting 113 F. Supp. 783.

It seems that De Lucia in this court contends that he cannot be denaturalized because the order of naturalization entered in 1928 is *res judicata*. He supports his contention by citing some of the syllabi from *United States* v. *Kusche*, 56 F. Supp. 201. This effort has brought forth from government counsel this opus:

> "Res judicata, as a defense in these proceedings, literally has been killed by drowning under the inundation of decisions released, first in *Johannessen* v. *United States*, 225 U.S. 227, for fraudulent procurement, in *United States* v. *Ness*, 245 U.S. 319, and in *Maney* v. *United States*, 287 U.S. 17, and *United States* v. *Ginsberg*, 243 U.S. 472, for illegal procurement of citizenship. Wilful misrepresentation and concealment of material facts in these cases have only opened the judicial floodgates wider and killed the defense deader. • • • Surely the defense here has been thoroughly necrotized."

More prosaically we hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was illegally and fraudulently procured, the latter was not *res judicata* of issues presented in the denaturalization proceeding.

In his brief De Lucia, under Proposition of Law VI, states: "The Trial Court erred in admitting the exhibits and giving them probative value." He cites no authorities in support of this statement. He merely says "See Argu-

ment," without referring to any part of the argument and certainly to no page number. The argument consists of 90 pages of printed matter running continuously without titles or breaks, and we do not feel obligated to attempt to locate the part to which reference is intended to be made by counsel.

Again, he states in Proposition of Law VII, the following:

> "It was error for the Trial Court to allow evidence of custom and to give same probative value."

He cites *Cufari* v. *United States*, 217 F. 2d 404, which furnishes a clue enabling us to locate the part of his argument which pertains to this proposition.

We construe De Lucia's contention that it was error "to allow evidence of custom" to mean that the evidence of custom in this case was inadmissible because it was incompetent. However, only the question of *materiality* (not *competency*) was raised by his objection to the admission of two basic government exhibits, a preliminary form for petition for naturalization, and a document known as a face brief. These documents were introduced by the government on the theory that they were made according to the established custom and practice in the Service.

It is elementary that De Lucia, having objected to the admissibility of these exhibits solely on the issue of materiality, is in no position to raise in this court an objection to their competency as evidence.[3] "Materiality", with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in

---

[3] *Employers Mut Casualty Co* v. *Johnson*, 201 F. 2d 153, 155. 28 U.S.C.A. rule 46 provides

> "* * * it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court * * his objection to the action of the court and his *grounds* therefor; * * *." (Emphasis supplied.)

dispute or has a legitimate or effective bearing on the decision of the same, while evidence is competent if it is fit for the purpose for which it is offered. 31 C.J.S. 868, 906. "Competency", in the law of evidence, is the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice;—applied, in the same sense, to documents or other written evidence. Black's Law Dictionary (1950) 355.

However, it is clear to us that, on the basis of evidence of custom in the naturalization service,[4] these documents were admissible. Nothing in the *Cufari* case indicates that

---

[4] It appears from the testimony of Andrew Jordan, who is a retired district director of immigration and naturalization, that he was familiar with the custom in the naturalization service and knew the handwriting of George McKay (McKay died before the trial) and Stephen Durisch, that on the face brief he made a pencil notation "J" indicating himself and "9-27-28" indicating date of admission on final hearing. He also testified that the initials "G.M." under the heading "Adjournments" and following the words and figures "from APR 10-19-28" were written by examiner McKay, and that the handwriting under the heading "Result of Examination" and the notation "Arr. no" is in the handwriting of examiner Durisch.

In reference to question 24 in preliminary form for petition for naturalization, which reads "Have you ever been arrested?", followed by the word "no" in handwriting, Jordan testified that a pencil check mark above the word "no", according to the practice would indicate that either the preliminary examiner or the designated examiner made the check mark at the time he was questioning the petitioner and that the applicant answered "no".

Durisch testified that all of the handwriting in ink on the front of the face brief is his and that his initials "SD" appear thereon. He further testified that the date August 10, 1920 on the face brief indicates when the naturalization petitioner arrived in the United States and his continuous residence thereafter, and that "Arr. no" means applicant was asked whether he had been arrested and that his answer was "no".

As to the preliminary form for petition for naturalization, Durisch testified that he made black ink marks along the left side of various lines, a procedure governed by instructions, which were for the purpose of showing that the examiner read each question to the applicant, and that the latter's oral answer agreed with that on the preliminary form.

All of this testimony was given without objection.

such records are not admissible. In fact, no such question was there raised. The court said, at 408:

> "The controlling question here * * * is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative."

The court then, at 409, proceeded to consider a docket slip, being Labor Form 2328 (which is similar to the face brief in this case), and also the testimony of the district director of immigration and naturalization as to the practice of examiners in asking applicants for citizenship if they had ever been arrested and noting applicants' answers on their docket slips. The court did not have before it and did not discuss any question as to the admissibility of such evidence. Hence the *Cufari* case is no authority on that question. As to the *effect* to be given to such evidence, the court held:

> "No doubt Cufari's docket slip coupled with the evidence of the practice and custom of Examiners generally and of Examiners Davis and Mahoney in particular is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not. * * *"

Thereupon, the court went on to decide the case *upon the foregoing evidence*, considered in connection with the fact that *Cufari, testifying on his own behalf, said that he had no recollection of being asked about arrests either at his preliminary examination or at the hearing on his petition in court.* Differing from the lower court's conclusion, it held that the government had not proved its case by that clear, unequivocal and convincing evidence which did not leave the issue in doubt, and hence it reversed the district court. But in the case at bar, De Lucia did *not* testify and there was no contradictory evidence leaving the issue in doubt.

For the reasons herein set forth, the decree of the district court is affirmed. AFFIRMED.

Opinion of Court of Appeals in Contempt Case Reported in De Lucia v. United States, 256 F. 2nd 489

Before SCHNACKENBERG, HASTINGS and PARKINSON, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant appeals from an order of the district court adjudging him guilty of contempt of that court on violating an order entered in the case of *United States of America* v. *Paul De Lucia*, then pending in said court, and fining him $500 therefor.

It appears that, while a denaturalization proceeding brought against De Lucia was pending in the district court[1] the government proceeded to take his deposition before a notary public, where he was duly sworn, and that (according to an affidavit of the assistant United States attorney assigned to the prosecution of the denaturalization case), during the course of the examination, government counsel asked De Lucia a series of questions, and that, "on the advice of his attorney William Scott Stewart, and also on his own initiative the defendant refused to answer the questions on the basis of the Fifth Amendment to the Constitution of the United States, asserting that to answer the same would tend to incriminate him."

The examination by government counsel commenced, as follows:

Q. Will you state your name?
A. Paul De Lucia.
Q. Where do you live, sir?
A. 1515 Bonnie Brae, River Forest.

---

[1] An appeal from a judgment against De Lucia in said case was heard in this court. We affirmed ____ F. 2d ____.

Q. Mr. De Lucia, on January 9 of 1925, did you file with the Clerk of the Circuit Court of Cook County a declaration of intention, No. 162822, to become a citizen of the United States of America under the name of Paul Maglio?

A. I respectfully refuse to answer. I don't want to be witness against myself, and I will declare the privilege of the Fifth Amendment.

Q. And at this time, you honestly believe that if you answered that question, you would tend to incriminate yourself?

A. I refuse to answer.

Mr. Stewart: He refuses to answer that question, too.

Mr. Bickley (government attorney): Q. Mr. De Lucia, on February 21, 1928, did you cause to be filed with the District Director of Naturalization in the Federal Building, Chicago, Illinois, your preliminary form for petition for naturalization, No. 379-55072, under the name of Paul Maglio?

A. I refuse to answer for the same reason.

Q. Do you honestly believe that if you answered that question, it would tend to incriminate you?

A. I refuse to answer for the same reason.

The interrogation by government counsel proceeded along the same general lines and the record shows that De Lucia's answer as aforesaid was repeated over 100 times.

The notary public, having certified to the court the aforesaid proceedings, the court, on the government's motion, ordered that defendant answer the oral interrogatories posed at his deposition within three days. Thereafter the government showed De Lucia had failed to answer said interrogatories and moved the court to

enter a rule on him to show cause why he should not be held in contempt of court, upon which motion the court deferred its ruling until after the trial of the denaturalization case. On the same day the court denied defendant's motion for reconsideration of its order requiring defendant to answer oral interrogatories. After the trial in the denaturalization case had ended, the district court allowed the government's motion for a rule to show cause and granted defendant 10 days to answer the rule, which he did. He therein relied, *inter alia*, upon "the privilege guaranteed by the Fifth Amendment". The contempt order followed.

The law is settled that the provision of the Fifth Amendment "that no person * * * shall be compelled in any criminal case to be a witness against himself" must be accorded liberal construction in favor of the right it was intended to secure. *Hoffman* v. *United States*, 341 U.S. 479, 486. It has also been held that the privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman*, v. *United States*, *supra*, and *Blau* v. *United States*, 340 U.S. 159.

In the *Hoffman* case, the court said, at 486:

> * * * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

It is apparent from the record before us that De Lucia was claiming his privilege under the provision of the Fifth Amendment and that government counsel and the notary public so understood it. He did so against the background of the pending denaturalization proceeding. It is obvious that his answers, if required, would furnish a link in the chain of evidence needed by the government to prosecute De Lucia for a federal crime. To us it appears clear that he was entitled to rely upon the privilege which he claimed. That being so, it was error to adjudge him guilty of contempt of court.

Therefore, the order from which this appeal has been taken, is reversed.

REVERSED.

Opinion of Judge Perry in case at Bar

Petitioner, Paul DeLucia, brings this action under the Declaratory Judgment Act and the Administrative Procedure Act (Title 28 U.S.C., §2201 and Title 5 U.S.C. §1009, respectively) seeking to set aside a deportation order against him and to restrain the District Director from deporting him.

On October 10, 1956, a denaturalization proceeding was filed against Paul DeLucia (hereinafter sometimes referred to as "Petitioner"). The complaint filed pursuant to the provisions of Sec. 340(a) of the Immigration and Naturalization Act of 1952 (66 Stat. 260) 8 U.S.C. 1451(a), prayed for the revocation of an order of the United States District Court for the Northern District of Illinois admitting Petitioner to citizenship and further prayed for the cancellation of the Certificate of Naturalization which was granted to Petitioner on September 27, 1928. The complaint in that proceeding alleged, in part, that Paul DeLucia, formerly known as Felice DeLucia, was born on or about November 14, 1887, in Naples, Italy, as a citizen of Italy; that on or about April 10, 1928, pursuant to the provisions of the Immigration and Nationality Act of June 29, 1906, he filed a petition for naturalization in the name of Paul Maglio, including in his petition a plea that his name be changed to Paul DeLucia; and that he was admitted to citizenship by the United States District Court for the Northern District of Illinois on September 27, 1928.

The complaint in the denaturalization proceeding further alleged:

> "6. That in the proceedings which lead up to his naturalization, the said Paul De Lucia formerly known as Felice De Lucia, alleged under oath:

"a. In his Declaration of Intention dated January 9, 1925, attached to and made part of his petition, that his name was Paul Maglio, and that he had been born in Apricena, Italy, on July 10, 1898.

"b. That in the preliminary form of the petition for naturalization dated February 21, 1928, and while testifying under oath before the naturalization examiner on April 10, 1928, alleged and stated that his full, true and correct name was Paul Maglio, that he had used the name of Paul De Lucia because he 'got married on that name'.

"c. That his mother's name was Torelli, Nunzia Maria; that he was born July 10, 1898, in Apricena, Italy; that he arrived in the United States at New York, New York August 10, 1920, on the SS Ryndam, and further alleged under oath that he had never been arrested.

"d. That in his petition for naturalization executed on April 10, 1928, he alleged under oath that his name was Paul Maglio; that he was born on July 10, 1898, at Apricena, Italy; that he had arrived in New York at the Port of New York City on August 10, 1920, on the Vessel Ryndam and that he was attached to the principles of the Constitution of the United States.

"e. That the allegations of the said Paul De Lucia formerly known as Felice De Lucia, defendant herein, described in the preceding paragraphs were false, untrue and were known by the defendant to be so false and untrue, in the following particulars:

"(1) That in truth and in fact his full true and correct name was not Paul Maglio, but was Felice De Lucia.

"(II) That in truth and in fact the defendant was born November 14, 1897, in Naples, Italy, and not on July 10, 1898, in Apricena, Italy.

"(III) That in truth and in fact his mother's name was Maria Annunziata and not Torelli Nunzia Marie.

"(IV) That in truth and in fact the defendant has been arrested and convicted for voluntary homicide under his true name of Felice De Lucia on May 18, 1917, at Naples, Italy.

"(V) That in truth and in fact the defendant's entry into the United States at New York City on August 12, 1920, was unlawful and there was not attached to his petition for naturalization a certificate of arrival for a lawful entry into the United States for permanent residence.

"7. That the said defendant, Paul De Lucia formerly known as Felice De Lucia, assumed the identity of Paul Maglio, in order to conceal his true identity, to hide from the immigration officers at the time of his arrival and from the naturalization examiners and the Naturalization Court the fact that he previously had been arrested and convicted for voluntary homicide in Naples, Italy, and that he had fled from Italy in order to escape arrest for a subsequent prosecution.

"8. That upon the false and fraudulent representations by the said Paul De Lucia that he was Paul Maglio and that he had never been arrested, and in relying upon the said false and fraudulent representations as set forth heretofore, the Immigration and Naturalization Service did issue a certificate of arrival in the name of Paul Maglio, which the said Paul De Lucia appended to his petition for naturalization."

A trial having been had before the court, Judge LaBuy, in a memorandum opinion reported in 163 F. Supp. at page 36, found, among other things, that the evidence clearly established that the defendant was the Paul DeLucia to whom a Certificate of Naturalization was granted September 27, 1928 and that he he used the name Paul Maglio when he entered this country and when he applied for a certificate of naturalization; that the government had conclusively shown that the defendant, Paul DeLucia, was not Paul Maglio, born July 10, 1898, in Apricena, Italy; that he falsely assumed the name of Paul Maglio to enter this country; that he committed perjury when he stated his name was Paul Maglio in the preliminary papers for citizenship and thereby committed a fraud on the court; that defendant Paul DeLucia voluntarily gave certain information on various occasions which was inconsistent with his identity as Paul Maglio, *viz.*, that he was born in Naples, Italy, on November 14, 1897, that his parents were Anthony and Mary or Maria Annunziata, that he had four sisters whose names were Emily, Anna, Clementine, and Louisa whose ages in 1947 were from 41 to 47 years; and that it had been clearly established that Paul DeLucia and Felice DeLucia are one and the same person. The court further held "that the use by this defendant of a name other than his own, his failure to disclose his true identity, and the concealment of other material facts vitiates the certificate of citizenship granted to him," and, on June 11, 1957, entered a decree of denaturalization.

The decree of the District Court was affirmed by the United States Court of Appeals (256 F. 2d 487) and certiorari was denied by the Supreme Court (358 U.S. 836).

Thereafter Petitioner registered as an alien.

An Order to Show Cause (dated December 5, 1958) which was served on Petitioner on December 10, 1958, contained the following language:

"It appearing, that you are in the United States in violation of law in that:

"1. You are not a citizen or national of the United States;

"2. You are a native of Italy and a national of Italy;

"3. You last entered the United States at New York, New York on August 12, 1920;

"4. You then entered the United States to remain permanently;

"5. You were not then in possession of an unexpired passport or official document in the nature of a passport showing your origin and identity;

"6. You were convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide; and that you are subject to be taken into custody and deported pursuant to the following provisions of law:

"Section 241(a) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit a person who has not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918, and the Executive Order in effect at the time of entry;

"Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens exclud-

able by the law existing at the time of such entry, to wit a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, under sec. 3 of the act of February 5, 1917 to wit: voluntary homicide."

On January 6, 1959, a hearing in deportation proceedings was held at Chicago, Illinois, at which Petitioner was represented by counsel.

Counsel, speaking on behalf of Petitioner, admitted that, as alleged in the Order to Show Cause, Petitioner last entered the United States at New York, New York, on August 12, 1920, and then entered the United States to remain permanently. Admitted for the purpose of the hearing were the allegations that Petitioner is not a citizen or national of the United States and that Petitioner is a native of Italy. Disputed were the allegations that (a) Petitioner was not then in possession of an unexpired passport or official document in a nature of a passport showing his origin and identity; and (b) that Petitioner was convicted in the Ordinary Court of Assize at Naples, Italy, on May 18, 1917, for the crime of voluntary homicide.

Petitioner's counsel and the Examining Officer entered into a stipulation relative to certain testimony and exhibits which were introduced in the denaturalization case of Paul DeLucia in the United States District Court at Chicago, Illinois, that

"Subject, of course, to Mr. Ricca's making any objections to any of the testimony, any of the exhibits in that case we have agreed and have stipulated that all of the witnesses who testified in the United States District Court for the Northern District of Illinois, at Chicago, Illinois, in the case of United States of Amer-

ica *vs.* Paul DeLucia, that the witnesses that testified there would, if they were present here, would testify similarly and that the exhibits that were introduced in that case are offered in evidence in this case and that these exhibits are now to be considered in evidence, subject, of course, to any objections by Mr. Stewart as to their materiality or admissibility."

Additional exhibits (which were not in evidence in the Court case) were also introduced and admitted into evidence by the Examining Officer including, among other things, the transcript of the testimony taken in the denaturalization case with the exception of the deposition of a Mrs. Terribile which was stricken from the record.

The Petitioner claimed privilege under the Fifth Amendment when asked by the Examining Officer under what name he had entered the United States—whether he denied that he entered under the name of Paolo Maglio—what his name was at birth—whether he denied that his true anld correct name was Felice DeLucia—whether he had a passport at the time of his entry at New York, New York, on August 12, 1920, a passport in the name of Felice DeLucia—whether he had at the time of his last entry, at New York, on August 12, 1920, a passport in the name og Paolo Maglio—and whether it was not true that he entered the United States at the Port of New York on August 12, 1920, in the name that was assumed and not his true and correct name. No further questions were asked of him by the Examining Officer.

On January 26, 1959, the Special Inquiry Officer entered an order of deportation, finding that Petitioner's entry in August, 1920, was unlawful and that he was excludable because he did not present a valid passport, and for the further reason that he had been convicted of a crime involving moral turpitude.

An appeal followed, and on August 25, 1959, the Board of Immigration Appeals approved the order of the Special Inquiry Officer and dismissed the appeal.

On August 26, 1959, there was filed in this court a Petition for Review and on October 1, 1959, a First Amended Petition for Review.

This matter is now before the court on the motion of the defendant District Director for a summary judgment.

There is now before this court, and the court has examined in detail, the certified copy of the transcript of the record of the Immigration and Naturalization Service as well as all of the exhibits which were introduced at the hearing in the deportation proceedings.

Petitioner contends that §241 of the Immigration and Nationality Act of 1952, (8 U.S.C. §1251) constitutes retrospective legislation, not within congressional power because of Article I, §9 of the Constitution which provides that "No bill of attainder or *ex post facto* law shall be passed."

As early as 1798 the Supreme Court decided in the case of *Calder* v. *Bull*, 3 Dall. 386, that "*ex post facto* laws have an appropriate significance; they extend to penal statutes and no further; they are restricted, in legal estimation, to the creation, and, perhaps, enhancement of crimes, pains and penalties." Justice Iredell, concurring in that case, added that the true construction of the prohibition as to *ex post facto* laws extends to criminal, not to civil cases.

Deportation is a civil and not a criminal proceeding, and, further, it is not a punishment. In *Bugajewitz* v. *Adams*, 228 U.S. 585, Mr. Justice Holmes said, at page 591:

> "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determina

tion by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment. It is simply a refusal by the Government to harbor persons whom it does not want . . ."

In the case of *Mahler* v. *Eby*, 264 U.S. 32, involving an appeal from a judgment of the District Court of the United States for Northern Illinois which dismissed five writs of habeas corpus and remanded the appellants, aliens, to the custody of the Immigration Inspector at Chicago for deportation, Mr. Chief Justice Taft said at page 38:

> "The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591. The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments. *Fong Yue Ting* v. *United States*, *supra*. The inhibition against the passage of an *ex post facto* law by Congress in §9 of Article I of the Constitution applies only to criminal laws. *Calder* v. *Bull*, 3 Dall. 386; *Johannessen* v. *United States*, 225 U.S. 227, 242; and not to a deportation case like this. *Bugajewitz* v. *Adams*, 228 U.S. 585, 591."

The 1953 case of *Galvan* v. *Press*, 347 U.S. 522, involved the deportation of an alien who had been a member of the Communist Party from 1944 until some time in 1946 or 1947—a period when it was a political organization and recognized as legal. Mr. Justice Frankfurter, speaking for the court, said at page 530:

> "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national

sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this court has said in *Ng Fung Ho* v. *White*, 259 U.S. 276, 284, deprive a man 'of all that makes life worth living'; and as it has said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, 'deportation is a drastic measure and at times the equivalent of banishment or exile.'

"In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of judicial discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation."

At this point the court inserted a footnote reading: "First in *Ogden* v. *Saunders*, 12 Wheat. 213, 271, and again in *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (appendix).

a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the *ex post facto* Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in *Calder v. Bull*, 3 Dall. 386. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to." And then Mr. Justice Frankfurter continued—

> "But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U.S. 101; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."

In view of the decisive language of the Supreme Court, this court overrules petitioner's contention that §241 of the Immigration and Nationality Act of 1952 is unconstitutional as an *ex post facto* measure.

In his complaint, petitioner argues that although under prior Acts there were two grounds for vacating a naturalization decree, *i.e.*, (1) fraudulent procurement and (2) illegal procurement, the 1952 amendment of Section 340(a) (8 U.S.C. §1451(a)) omitted the ground of illegal procurement. As set forth in the 1952 Act the grounds are "that

such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation."

Subsection (i) of aforesaid Section 340 (8 U.S.C. 1451 (i)) provides:

> "(i) The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act."

This court is of the view that illegal procurement as a ground for denaturalization was saved by Section 405(a) of the Immigration and Nationality Act of 1952. In this connection it should be observed that in the opinion of the Court of Appeals in the denaturalization case (256 F. 2d 487), Judge Schnackenberg said, at page 491:

> "... We hold that, inasmuch as the denaturalization decree was based upon charges of wilful concealments and misrepresentations by which the entry of the order of naturalization was *illegally and fraudulently procured*, the latter was not *res judicata* of issues presented in the denaturalization proceeding." (Italics supplied)

Petitioner claims that he cannot be deported because he has acquired a status which is protected by the savings clause in the 1952 Act. (§405(a), 8 U.S.C. 1101, note)

Section 241 of the 1952 Act (66 Stat. 204, 8 U.S.C. §1251) provides, in part that

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

"(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

The deportation proceeding under review was brought on the grounds that under the above quoted Section 241(a) (1) petitioner at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry in two respects—

(1) a person who has not presented an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity, as required by the Passport Act of May 22, 1918, and the Executive Order in effect at the time of entry; and

(2) a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States under sec. 3 of the Act of February 5, 1917, to-wit, oluntary homicide.

Section 405(a) of the 1952 Act reads in part as follows:

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (sic), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.

. . . . . "

and subsection (d) of said Section 405 provides:

> "(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a) of this section notwithstanding (1) that any such alien entered the United States prior to June 27, 1952, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a) of this section, occurred prior to June 27, 1952."

Discussing a similar claim of status in the case of *Lehmann* v. *Carson*, 353 U.S. 685, Mr. Justice Whittaker said, in pertinent part:

> "Thus, even if we assume that respondent has a 'status' within the meaning of §405(a), that section by its own terms does not apply to situations 'otherwise specifically provided' for in the Act. Section 241(a)(1) specifically provides for the deportation of an alien who 'at the time of entry was . . . excludable by the law existing at (that) time.' • • • And §241(d) makes §§241 a)(1) . . . applicable to all aliens covered thereby, 'notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.' It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, (citing in a footnote the cases of *Bugajewitz* v. *Adams*, 228 U.S. 585; *Ng Fung Ho* v. *White*, 259 U.S. 276; *Mahler* v. *Eby*, 264 U.S. 32; *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Galvan* v. *Press*, 347 U.S. 522; *Marcello* v. *Bonds*, 349 U.S. 302) to cover offenses of the kind here involved. This case is, therefore, 'otherwise specifically provided' for within the meaning of §405(a)."

Examining the petitioner's contention that he did have a passport: As a condition precedent to entry to this

country, the Act of May 22, 1918, (22 U.S.C. §§ 223-226), as supplemented by presidential proclamations, required that an alien present a properly visaed passport. As authorized by Section 1(a) of that Act; Executive Order 2932 of August 18, 1918, was issued, Section 5 of which defined a passport as "any document in the nature of a passport issued by the United States or by a foreign government, which shows the identity and nationality of the individual for whose use it was issued." Section 31 of that Order provided that "no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917," and turning to the Joint Order of July 26, 1917, we find that it requires that—

> ". . . . . Every person leaving a foreign country for the United States . . . . with the purpose of entering, passing through or touching at a port of the United States shall be required; before he is permitted to enter the United States, to present a valid passport, or other official document in the nature of a passport, *satisfactorily establishing his identity and nationality* . . . ." (Italics supplied).

From the foregoing it is clear that one of the basic purposes of a passport is to identify the person who bears it. One who presents a passport issued in the name of another is not presenting identification of himself. Petitioner had not previously assumed or used the name of Paul Maglio. He adopted that name and identity only for the express purpose of gaining admittance to this country. The suppression of his own identity was most relevant to his admission to this country because by concealing his true identity he was also concealing his prior criminal record—a record which would have made him excludable. In misrepresenting, as he did, his true identity, he per-

petrated a fraud on the government in obtaining his immigration visa. A passport or visa obtained by means of such relevant misrepresentations and deception is invalid and, as the government argues, is no passport or visa at all. This court is of the view that petitioner had no passport at the time he entered this country.

Petitioner argues that although the decree of denaturalization cancelled his certificate showing admission to citizenship and the order upon which that certificate was based, it left in effect the Certificate of Arrival—that that part of the proceedings of the Naturalization Court concerning the Certificate of Arrival stood as a bar to the entry of the deportation order.

The Certificate of Arrival reflects data which was taken from the registry made by commissioners of immigration in the case of

> "each alien arriving in the United States from and after the passage of this Act (of June 29, 1906) of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and if he entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof." (34 Stat. 596)

The Certificate of Arrival in this case was based on data taken from the aforesaid registry, which data, in turn, was based on misrepresentations wilfully made by petitioner to immigration authorities when he entered this country. Certainly there cannot be attributed to such a certificate a veracity which was lacking in the records on which it was based.

It is the view of this court that petitioner's reliance on his Certificate of Arrival as a bar to his deportation is not well placed.—particularly in view of the findings made by Judge LaBuy in the denaturalization case.

In his complaint, petitioner makes the statement: "Assuming for the sake of argument that petitioner was excludable some move was required by law within five years." As pointed out by the government in its brief, the Immigration and Nationality Act of 1952 retroactively expunged prior statutes of limitation and decreed deportation for earlier improper entries, without time limitation. *Lehmann* v. *Carson*, 353 U.S. 685; *Lehmann* v. *Sciria*, 248 F. 2d 519 (C.A. 6, 1957); *Barber* v. *Hong*, 254 F. 2d 382 (C.A. 9, 1958).

Turning, now, to the second ground advanced for petitioner's deportation—that at time of entry he was excludable as a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, under sec. 3 of the act of February 5, 1917 to wit: voluntary homicide.

The evidence in this matter indisputably establishes that the petitioner herein is the same person as the Felice DeLucia who was convicted and sentenced in Italy in 1917 for the crime of voluntary homicide on the person of Emilio Perilli and who was convicted in 1924 in Absentia for the crime of voluntary homicide on the person of Vincenzo Capasso.

The fact of petitioner's convictions having been established, it was not within the province of the Special Inquiry Officer to inquire into the circumstances surrounding the homicides. It was his duty to determine only whether or not the crimes for which petitioner had been convicted involved moral turpitude, and this he did.

Since the conviction of the petitioner in 1924 was in Absentia and subsequent to his entry into the United States in 1920, only his 1917 conviction for voluntary homicide is material to the deportable charge. The intentional killing of a human being is a crime the inherent nature of which involves moral turpitude. The petitioner's conviction in Italy in 1917 for voluntary homicide was prior to entry into this country in 1920 and certainly for a crime involving moral turpitude.

In view of the concise language of Section 3 of the aforesaid Act of February 5, 1917, petitioner was excludable at the time of his entry to this country.

This court does not agree with petitioner's contention that the Special Inquiry Officer took evidence in the absence of petitioner and without notice when he obtained and referred to a copy of the Italian statute.

It is the view of this court after an over-all survey of the record and evidence in this matter that the findings of the Special Inquiry Officer and his decision of the petitioner's deportability are based upon reasonable, substantial and probative evidence; that petitioner herein was in all respects accorded a fair hearing and due process of law; that petitioner is deportable; and that the motion of defendant District Director for summary judgment should be granted.

Opinion by Court of Appeals in case at Bar

Before KNOCH, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal from a summary judgment sustaining a deportation order. The order was issued after a hearing before a special inquiry officer of the Immigration and Naturalization Service. The respondent, Paul De Lucia, appealed the ruling to the Board of Immigration Appeals. The appeal was dismissed. The respondent thereafter sought a review in the District Court.

The questions presented are: (1) Whether the findings of the special inquiry officer are supported by substantial evidence, (2) whether the retrospective provisions of the Immigration and Naturalization Act of 1952 (8 U.S.C. §1101 *et seq.*) are applicable to an alien excludable at the time of his entry under the Passport Act of 1918 (22 U.S.C. 223-226), and (3) whether the respondent was afforded a fair hearing before the administrative tribunal.

De Lucia, a native and citizen of Italy, entered the United States at New York City August 12, 1920. He was naturalized September 27, 1928, by order of the United States District Court for the Northern District of Illinois. A decree cancelling his certificate of naturalization was entered June 11, 1957, in the same court by Judge LaBuy. *United States v. De Lucia*, 163 F. Supp. 36. The cancellation was based on a finding that respondent falsely assumed the name of Paul Maglio when he entered this country; that he failed to disclose his true identity; and that he concealed other material facts. This Court affirmed. 256 F.2d 487. Certiorari was denied by the Supreme Court. 358 U.S. 836.

The deportation proceeding was initiated by an order to show cause wherein it was charged that respondent when he entered the United States was not in possession of a passport or other official document showing his origin and identity and that he had been convicted of the crime of voluntary homicide and sentenced to prison prior to his entry; that as a consequence he was deportable by reason of §241 (a)(1) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) in that he was within one or more of the classes excludable by law existing at the time of his entry, to-wit: A person who had not presented a passport or other travel document showing his origin and identity as required by the Passport Act of 1918 and the Executive Order in effect at the time of entry. (Exec. Order No. 2932, August 18, 1918); also, a person who had been convicted of a crime involving moral turpitude prior to entry as proscribed by Section 3 of the Naturalization and Immigration Act of 1917 (8 U.S.C. 136).

By stipulation of counsel, the transcript of the testimony and the exhibits submitted to Judge LaBuy in the naturalization proceeding with certain immaterial exceptions were made a part of the record considered by the Special Inquiry Officer in the deportation proceeding. Since a recital of this evidence is contained in Judge LaBuy's opinion, it is deemed unnecessary to repeat the evidence in detail here.

Section 1(a) of the Passport Act of 1918 authorized the President to issue rules and regulations covering the entry and departure of all aliens. Pursuant to this authorization, Executive Order 2932 was issued August 8, 1918. Section 5 of the Order defined a passport as one "which shows the identity and nationality of the

individual for whose use it was used. . . ." Section 31 of the Order provided that "no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917." The Joint Order required each alien entering the United States "to present a valid passport or other official document in the nature of a passport, satisfactorily establishing his identity and nationality. . . ."

The Special Inquiry Officer found that respondent at the time he entered the United States did not present a passport showing his true identity in that he was not the person described therein and accordingly, the passport he presented did not meet the requirements of Executive Order 2932. He concluded that, because of this, respondent was not entitled to enter the United States under the provisions of the Order and the underlying Passport Act of 1918, and finally, as a consequence, respondent was excludable under the then existing laws and is presently deportable under the provisions of §241(a)(1) of the Immigration and Nationality Act of 1952.

The evidence showed that in his naturalization petition the respondent stated that his name was Paul Maglio; that he arrived at the port of New York August 10, 1920 on the S.S. Ryndam; that he was born in Apricena, Italy, July 10, 1898; and that his mother's maiden name was Nunzia Maria Torelli. An alien registration form executed by the respondent in 1958 contained the same information as to name and manner of entry. The records of the S.S. Ryndam, which sailed from Boulogne August 1, 1920, listed a passenger under the name of Paolo Maglio who was born in Apricena and whose father was Enrico Maglio.

The respondent did not produce his passport at the hearing as requested. The Officer concluded, however, that he possessed a passport at the time of his entry into this country because, as the evidence showed, if he were not in such possession, he would have been detained at the point of entry for a Board of Special Inquiry and a notation of this would have been made on the ship's manifest.

The evidence also showed that one Paul Maglio exists and that he entered this country August 3, 1920 on the S.S. Duca Degli Abruzzi nine days before respondent's entry; that he was born July 10, 1898 in Apricena, Italy; that his mother's maiden name was Nunzia Maria Torelli; and that his father was Enrico Maglio. This Paul Maglio is not the respondent. The evidence showed that respondent was born Felice De Lucia November 14, 1897, in Naples, Italy; that his mother's maiden name was Maria Annunciata; and that his father was Antonio De Lucia.

This recital of facts makes it apparent that De Lucia materially misrepresented his name, age, birthplace and parentage, and that he assumed the identity of another, namely, Paul Maglio. Accordingly, there was substantial evidence before the Special Inquiry Officer to find that respondent entered this country without a valid passport showing his identity.

The evidence further establishes that respondent is the same person as the Felice De Lucia who was charged in Italy, in 1917, with the crime of voluntary homicide. Felice De Lucia was found guilty by a jury of voluntary homicide "with grave provocation" and carrying a gun "under extenuating circumstances." He was sentenced to imprisonment for a period of three years. The sentence was reduced because of the extenuating circumstances. The Hearing Officer con-

cluded that respondent had been convicted of a crime involving moral turpitude.

It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term "voluntary" indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable. So long as the homicide is voluntary and not justifiable no amount of provocation can remove it from the class of crimes involving moral turpitude. *United States, ex rel. Sollano* v. *Doak*, 5 F. Supp. 561; *Holloway* v. *Holloway*, 126 Ga. 393, 55 S.E. 191. Accordingly, we conclude that there was substantial evidence upon which the Special Inquiry Officer found that respondent was a person who was excludable under under Section 3 of the Immigration Act of February 5, 1917, and therefore subject to deportation under the Immigration and Naturalization Act of 1952.

Respondent contends that the Hearing Officer erred in referring to the Italian Code in his decision as to moral turpitude since no proof of the foreign law was made at the hearing. We do not reach this question because, in our view, it was only necessary for the Hearing Officer to consider the record of conviction and apply the prevalent standards of what constitutes moral turpitude to reach his conclusion.

Respondent argues that Section 405(a) of the 1952 Immigration and Naturalization Act (8 U.S.C. 1101, Note) has preserved to him a status of non-deportability. He further argues that the Act of February 5, 1917 (8 U.S.C. 155) required the government to bring deportation proceedings against an alien within five years of his entry and that it was not the intent of Congress in enacting the 1952 Act to erase this limitation.

Respondent cannot avail himself of the protection contained in the savings provision of Section 405(a). This section provides among other things that prior statutes and statuses shall be continued in force and effect ". . . unless otherwise specifically provided herein. . . ." The Supreme Court in *Lehmann* v. *Carson*, (353 U.S. 685) held that Section 241(a)(1) of the 1952 Act does "otherwise specifically provide" for the deportation of any alien who at the time of entry was excludable by the law existing at that time, and that Section 241(d) makes 241(a) applicable to all aliens "notwithstanding (1) that any such alien entered the United States prior to 1952 or (2) that the facts by reason of which any such alien belongs to an excluded class occurred prior to 1952." The Court concluded that it was "undisputable therefore that Congress was legislating retrospectively, as it may do. . . ."

Respondent attacks the fairness of the administrative hearing with his claim that an improper inference was drawn from his refusal at the hearing to answer questions concerning his entry. Section 291 of the Immigration and Naturalization Act (8 U.S.C. 1361) casts the burden of proof in a deportation proceeding upon the respondent to show the time, place and manner of his entry. It is respondent's contention that his reliance upon the Fifth Amendment in refusing to give additional information resulted in an inference by the Hearing Officer that the Section 291 burden was not met.

Without reaching the question of whether such an inference could be made, it is apparent from the record that the Officer did not rely upon any such inference. He recognized the government's counter burden of

showing unlawful entry and there is ample evidence that this burden was sustained.

While respondent may have been within his rights in refusing to testify at the hearing, it does not follow that his reliance on the Constitutional protection can be used as a weapon to attack the fairness of the hearing in claiming that the government could only discharge its burden of proving his deportability by drawing unwarranted inferences from his refusal to testify.

Respondent contended in the District Court and asserts here that in connection with his naturalization proceeding a certificate of arrival was issued by the immigration authorities verifying the information stated in his application for citizenship and which related to his entry into this country; that this certificate of arrival was part of the basis of the admission order; that Judge LaBuy made no finding in the denaturalization proceeding that the certificate was improperly obtained; and that, accordingly, the admission proceeding pertaining to the certificate stands as a bar to the present deportation. In other words, respondent contends that this constitutes res judicata of lawful entry.

The judgment entered in the denaturalization proceeding cancelling respondent's certificate of citizenship nullifies any basis upon which the doctrine of res judicata can apply. Moreover, a certificate of arrival issued by immigration authorities which is based on records that do not reflect the true facts can in no manner be used to preclude the deportation of an alien who entered the country illegally.

We affirm the District Court's judgment sustaining the order of deportation.

APPENDIX B

Section 241(a), 66 Stat. 204, 8 USC 1251(a):

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude not arising out of a single scheme or criminal misconduct regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Section 241(b), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251 (b) provides:

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

Section 241 (d), 66 Stat. 208, 8 U.S.C. (1952 Ed.) 1251 (d) provides:

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien

entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 403 (a), 66 (Stat. 280) provides:

The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

(13) Act of February 5, 1917 (39 Stat. 874).

Section 403 (b), 66 Staf. 280, provides:

(b) Except as otherwise provided in section 405, all other laws, or parts of laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency, repealed.

Section 405 (a), 66 Stat. 280, 8 U.S.C. (1952 Ed.), 1101 note provides:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecution, suits, actions, proceedings, statutes (statuses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein,

hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provfsions of law in effect on the date of the issuances of such visa. An application for suspeusion of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

The Immigration Act of February 5, 1917, 39 Stat. 874, provided in pertinent part:

Section 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act, or in violation of any other law of the United States: . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: . . . Provided further, that the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned . . .

Section 340 (a) of the Immigration and Nationality Act, 8 U.S.C. 1451 (a):

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person

to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by wilful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last has his residence.

S. 3455, 81st Congress, 1st Sess.

Title III Nationality and Naturalization

Savings Clause

Sec. 361. (A) nothing contained in this title, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal brought, or any status, condition, act,

thing or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, acts, things, or matters, the statutes or parts of statutes repealed by this Act are hereby continued in force and effect.

(b) Except as otherwise specifically provided in this title, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(4356-2)

1954-1959 Cumulative Supplement to Fourth Edition of Immigration and Nationality Act, by Sidney Kansas

p. 180 PART 334-A—DECLARATION OF INTENTION

§334a.11 *Preliminary form for declaration of intention.* Each prospective declarant shall, before making and filing a declaration of intention, submit to the Service an application therefor on Form N-300 in accordance with the instructions contained therein. The application may be submitted at any time after the applicant has been lawfully admitted for permanent residence and has attained the age of eighteen years.

§334a.12 *Notification to applicant.* Following approval of the application by the Service, the applicant shall be notified when and where to appear to make and file the declaration of intention.

§334a.13 *Filing of declaration of intention.* A clerk of court or his authorized deputy shall not accept a declaration of intention for filing, unless and until there shall have been received from the Service the applicant's approved Form N-300 authorizing the issuance of the declaration

and showing that the applicant is residing in the United States pursuant to a lawful admission for permanent residence.

§334a.14 *Execution and fee.* The declaration of intention shall be executed by the alien under oath on Form N-315, in triplicate, before the clerk of any court exercising naturalization jurisdiction or his authorized deputy, regardless of the place of residence of the applicant, and only in the office of said clerk. The applicant may sign the declaration and the photographs affixed thereto in any language, or by mark if unable to write. The declarant shall pay the clerk of court, at the time the declaration of intention is filed, the statutory fee of $5.

§334a.15 *Disposition.* The original declaration of intention shall be retained and filed of record by the clerk of court, and the triplicate delivered forthwith to the alien. The duplicate, with Form N-300, shall be forwarded to the appropriate district director on the first day of the month following the month in which the declaration is filed, in accordance with §339.2 of this chapter for inclusion in the declarant's file.

§334a.16 *Declaration of intention; numbering, indexing, binding.* Declarations of intention shall be numbered consecutively in the order in which they are filed in a series separate from petitions. They shall be filed chronologically in separate volumes, indexed, and made a part of the records of the naturalization court.

p. 185 PART 335b—PROOF OF QUALIFICATION FOR NATURALIZATION: WITNESSES: DEPOSITIONS

§335b.1 *Proof of residence and other qualifications—*(a) *Whenever State residence is required.* At the preliminary examination upon the petition for naturalization

before a designated examiner, or if no preliminary examination is held, at the final hearing before the court, residence in the State in which the petitioner resides at the time of filing the petition and the other qualifications required by section 316(a) of the Immigration and Nationality Act during such residence, shall be proved only by the oral testimony of two credible witnesses, citizens of the United States. Residence and other qualifications required by section 316(a) of the Immigration and Nationality Act, for the period prior to such six-month period shall be proved either by depositions taken in accordance with §335b.12 or by the oral testimony of at least two credible witnesses, citizens of the United States. If oral testimony is taken from witnesses who did not verify the petition, affidavits on Form N-451 shall be executed by such other witnesses, in duplicate, before the clerk of the court or the designated examiner, one copy of which shall be attached to the original petition and the other to the duplicate petition.

APPENDIX C

The Immigration and Nationality Act

Sec. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate for naturalization certificate for citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (statutses), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation for suspension of deportation under section 19 of the Immigration Act

Nationality Act of 1940

Sec. 347(a) Nothing contained in either Chapter III or in Chapter V of this Act, unless otherwise provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, or of citizenship, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any act, things, or matter, civil or criminal, done or existing, at the time of this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters, the statutes repealed by this Act are hereby continued in force and effect.

of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

(b) Any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined within two years thereafter in accordance with the requirement of law in effect when such petition was filed.

APPENDIX D

Text Book

Immigration Laws of the United States

Second Edition by Frank L. Auerbach, p. 277:

(b) Crime involving moral turpitude. Any crime involving an act intrinsically and morally wrong, or an act done contrary to justice, honesty, principle, or good morals, is a crime involving moral turpitude (*Malim in se*). It is to be distinguished from an act which is not inherently immoral, but becomes an offense only because its commission is expressly forbidden by law (*Malum Prohibitum*). The violation of statutes which merely license or regulate and impose criminal liability without regard to evil intent does not involve moral turpitude. Whether a crime, committed in the United States or abroad, involves moral turpitude under the immigration laws is determined by standards prevailing in the United States.

The courts have set certain standards which must be followed in determining whether a crime involves moral turpitude. First a determination has to be made what law or specific portion of law has been violated, and then without regard to the act committed by the alien, whether that law inherently involves moral turpitude. The latter determination must include a finding whether the violation of law "under any and all circumstances" involves moral turpitude If it is found that the violation of the law under any and all circumstances involves moral turpitude then all convictions under that law involve moral turpitude. If, however, it is found that the particular statute punishes acts which do not involve moral turpitude, as well as those which do, then no conviction under that law involves moral

turpitude, although in the particular instance the conduct was immoral.

If under a given statute serious and nonserious crimes, *i.e.*, those involving moral turpitude and those not involving it, cannot be separated or distinguished, the statute must be taken at its minimum. If, on the other hand, the provisions of the statute are divisible or separable and so drawn as to include within its definition crimes which do and some which do not involve moral turpitude, the record of conviction may be examined to determine which provision of the statute is involved. • • •

p. 281

(d) Conviction in absentia. A conviction in absentia of a crime involving moral turpitude does not constitute a conviction within the meaning of Section 212. (a) (9). (22 CFR 41.91 (a) (9) (v) and 42.91(a) (9) (vi). • • •

p. 283

(h) Juvenile delinquencies not crimes. Prior to the enactment of the Immigration and Nationality Act, it was a well established administrative holding that juvenile delinquencies are not considered to be crimes within the meaning of the Immigration laws. The Board of Immigration Appeals and the Department of State hold that the Immigration and Nationality Act has made no change in the determination. Consequently, aliens who have been found to be juveniles and have been treated as juvenile offenders in the deposition of their cases are not considered as having been "convicted of a crime involving moral turpitude."

p. 284

(i) • • • A sentence which has been suspended by the court at the time of imposing sentence is not regarded as having been "actually imposed" within the meaning of Section 4.

APPENDIX C.

Certificate of Arrival for Naturalization Purposes.

This certificate is for the use of the person applying for it only, and is issued for naturalization purposes in compliance with place, and matter of arrival in the United States.

U.S. DEPARTMENT OF LABOR
BUREAU OF NATURALIZATION
CERTIFICATE OF ARRIVAL DIVISION
ELLIS ISLAND, NEW YORK.

This is to certify that the following named alien arrived in the United States on the date and in the manner described below, at Ellis Island, New York. Name of Alien, Maglio, Paola. Date of Arrival for permanent admission, August 10, 1920 Manner of Arrival Ryndam.

By Direction of the Secretary of Labor.

506911 Raymond F. Christ
Commissioner of Naturalization

We quote from the record made before Judge Wilkerson (App. 219):

"Order Of Court Admitting Petitioner.

Upon consideration of the petition of Paul Maglio and affidavits in support thereof, and further testimony taken in open Court it is ordered that said petitioner, who has taken oath required by law, be, and hereby is, admitted to become citizen of the United States of America this Sept. 27, 1928.

It is further ordered, upon consideration of the said Paul Maglio that his name be, and hereby, is, changed to Paul DeLucia under authority of the provisions of Section 6 of the Act approved June 29, 1906. (34 Stat.

L. pt. 1. p. 596) as amended by the Act approved March 4, 1913, entitled 'An Act to create a Department of Labor.'"

The judgment entered by Judge Wilkerson is as follows (App. 217):

"Be it remembered, that Paul DeLucia, then resident at number 905 So Halstead Street, (city town) of Chicago, State of Illinois; who previous to his her naturalization was a citizen subject of Italy, having applied to be admitted a citizen of the United States of America pursuant to law, and at a Regular term of the District Court of the United States, held at Chicago, on the 27th day of September, in the year of our Lord nineteen hundred and 28, the court having found that the petitioner intends to reside permanently in the United States, and that he had in all respects complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.

In the Testimony Whereof the seal of said court is hereunto affixed on the 27th day of September in the year of our Lord nineteen hundred and 28, and our Independence the one hundred and fifty-third."

APPENDIX D.

In the

United States Court of Appeals

For the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PAUL DE LUCIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12093

MOTION FOR LEAVE TO FILE PETITION UNDER RULE 60(b) IN THE DISTRICT COURT

Now comes Paul DeLucia, by Wm. Scott Stewart his attorney and requests leave to file a petition in the District Court pursuant to Rule 60 (b) Federal Rules of Civil Procedure.

PAUL DELUCIA
Plaintiff-Appellee

BY

WM. SCOTT STEWART
Attorney for Plaintiff-Appellee

SUGGESTIONS

in support of Motion for leave to file petition

1. For reasons disclosed in the various briefs filed in causes No. 12093, 12094 and 13365 counsel is of the opinion that substantial questions may be presented by virtue of clauses (1), (4), (5) and (6) of Rule 60 (b), Federal Rules of Civil Procedure.

2. The decree to be thus attacked has been affirmed by this Honorable Court. *United States* v. *DeLucia*, 256 F. 2d 487, cert. denied 358 U.S. 836. The rule

is stated in *Butcher & Sherrerd* v. *Welsh*, 206 F. 2nd 259, Aff'd 206 F. 2nd 259. But see also *Ginsberg* v. *Stern*, 242 F. 2nd 379.

3. If the said decree were set aside, DeLucia would cease to be subject to the jurisdiction of the Administrative body and therefore the deportation order would be void.

4. A petition filed pursuant to Rule 60 (b) might restore jurisdiction in the District Court in order that findings of fact and conclusions of law might be made defining the jurisdiction of the District Court. The subsequent deportation proceedings have made it necessary to have a clearer statement of what was intended by the decree entered by Judge LaBuy.

5. Not only was *James* v. *United States*, 366 U.S. 213, decided after Judge LaBuy entered his decree and this Honorable Court affirmed, but it is significant to note that the Supreme Court expressed the effect of a change of judicial attitude after Your Honors had decided the *James* case, without having the point called to the attention of this Honorable Court. It is reasonable to conclude that if Judge LaBuy had had the benefit of the *James* case and if the *James* case had been before Your Honors, the result would have been different.

6. We seek a decision not only based upon a change in judicial attitude, as expressed by the Supreme Court, but based also on the effect to be given to changes made in the law by Congress.

7. In *United States* v. *Polites*, 24 F.R.D. 401, affirmed 272 F. 2nd 709 an alien filed a motion under 60(b) (5) and (6) for relief from a judgment cancelling his citizenship. The alien at the time was resisting an order of deportation. Judge Picard in denying the petition said, p. 404:

> "Ordinarily we would have granted petitioner's prayer * * *"

but for the fact that petitioner had abandoned an appeal in the denaturalization case.

8. We trust that a decision on this motion by Your Honors will pave the way for further proceedings, either in the District Court or in the Supreme Court, by way of an additional petition for the Writ of certiorari.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Paul De Lucia, Plaintiff-Appellant	)	
v.	)	No. 13365
Wilbor T. Flagg, District Director, etc. Defendant-Appellee	)	and No. 12093

GOVERNMENT'S ANSWER IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE PETITION UNDER RULE 60(b) IN THE COURT BELOW.

United States of America, plaintiff-appellee in No. 12093, in opposition to defendant's motion for leave to file a petition under Rule 60(b) in the court below, says as follows:

1. The motion for leave and the suggestions in support thereof do not state a claim upon which relief can be granted.

2. Insofar as the proposed leave to file a motion under Rule 60(b) the Government points out that Rule 60(b)(1), predicated on mistake, inadvertence, or excusable neglect, expressly provides that the motion under 60(b)(1) must be made "• • • not more than one year after the judgment, order or proceeding was entered or taken", and insofar as the motion is predicated on 60(b)(4), (5) and (6), it is not made within a reasonable time after judgment as required expressly by the Rule. It is to be remembered that the opinion of this Court affirming the judgment of denaturalization against defendant was filed on June 18, 1958.

3. The defendant in his Suggestions brings nothing new to the Court. There has been no significant change in the law of denaturalization or deportation affecting this defendant since this Court's decision in *U.S.* v. *De Lucia* filed on June 18, 1958. (256 F. 2d 487.) Of significance in this

regard is the language of the Ninth Circuit in *Title* v. *U.S.*, 9 Cir., 263 F. 2d 28, 31:

> "Appellant recognizes that there are reasons of public policy for assuring the finality of judgments, but suggests that under Rule 60(b)(5), Fed.R.Civ.P., 28 U.S.C.A., a special rule should be adopted in denaturalization cases relaxing the strictness of the ordinary rule. In support of this, appellant refers to the language of the dissenting Justices in *Ackerman* v. *United States*, 1950, 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207. We are, of course, bound by the majority opinion in Ackermann, just as we are in Zucca. Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. *Ackermann* v. *United States, supra; Morse-Starrett Products Co.* v. *Steccone*, 9 Cir., 1953, 205 F.2d 244, 248-249; *Berryhill* v. *United States*, 6 Cir., 1952, 99 F.2d 217; *Loucke* v. *United States*, D.C.S.D.N.Y. 1957, 21 F.R.D. 305. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change. *Collins* v. *City of Wichita, Kansas*, 10 Cir., 1958, 254 F.2d 837; *Berryhill* v. *United States, supra; Loucke* v. *United States, supra.*"
>
> *Title* v. *U.S.*, 9 Cir., 263 F.2d 28, 31.

4. It is a settled rule that a change in the judicial view of applicable law after final judgment, and such is not the case here, we submit, is not a basis for vacating a judgment or decree, and affirmance thereof, entered before announcement of the change. *Sunal* v. *Large*, 332 U.S. 174; *Berryhill* v. *U.S. et al.*, 6 Cir., 199 F.2d 217, 219; *U.S.* v. *Kunz*, 2 Cir., 163 F.2d 344.

A further exhaustive treatment of the entire problem of post-appeal review by way of filing a petition under 60(b) of the Federal Rules of Civil Procedure is given by the Supreme Court in *Ackermann* v. *U.S.*, 340 U.S. 193.

Respectfully submitted,

James P. O'Brien
United States Attorney

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Thursday, January 11, 1962
Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

PAUL DeLUCIA,
Plaintiff-Appellant,
No. 13365 vs.
W. T. FLAGG, District Director, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition of plaintiff-appellant Paul DeLucia for a rehearing of this cause, filed herein on December 18, 1961, be, and the same is hereby denied.

It Is Further Ordered by the Court that the motion of plaintiff-appellant Paul DeLucia for a stay of the issuance of the mandate, which motion is printed as a part of plaintiff-appellant's petition for a rehearing filed herein on December 18, 1961, be, and the same is hereby granted, and the issuance of the mandate of this Court in this appeal is hereby stayed for a period of thirty (30) days pursuant to Rule 28 of the Rules of this Court.

It Is Further Ordered by the Court that the motion of plaintiff-appellant Paul DeLucia to transfer exhibits, which motion is printed as a part of plaintiff-appellant's petition for a rehearing filed herein on December 18, 1961, be, and the same is hereby granted, and the Clerk of this Court is authorized and directed to certify the exhibits and briefs of the parties to this appeal to the Supreme Court of the United States.

It Is Further Ordered by the Court that the motion of defendant-appellant Paul DeLucia for leave to file petition under Rule 60(b) of the Federal Rules of Civil Procedure in the District Court, which motion is entitled in Appeal No. 12093—United States of America, Plaintiff-Appellee vs. Paul DeLucia, Defendant-Appellant, and is printed as a part of the petition for rehearing filed herein on December 18, 1961, be, and the same is hereby denied.

APPENDIX E.

History of the Savings Clause in the McCarran Act.

1. *S. 3455, 81st Congress, 1st Session, Section 361.** This Honorable Court observed in *United States* v. *Menasche*, 348 U.S. 528, 532 (1954), that section 347 of the Nationality Act of 1940 (8 U.S.C. 747) was the direct antecedent of the 1952 Act savings clause. A comparative print of the two savings clauses is set forth in Appendix D herein. The 1940 Act savings clause was originally taken verbatim and placed in the naturalization title (Title III) of the first McCarran bill (S. 3455, 81st Congress, 1st Session, Section 361). The full text of these provisions is set forth in Appendix E to this petition. The only changes made in S. 3455 were (a) the addition of the words "status and condition" and (b) the provision that it was to apply "unless otherwise specifically provided" in the naturalization title (Title III). As worded and as set forth in Title III, the savings clause was strictly limited to nationality and naturalization matters.

In S. 3455, Section 402(a)(13), 402(a)(23) and 402(a)(39) repealed the existing immigration laws without any savings clause. The repeal of pre-existing laws without a savings clause or a retroactive provision would have rendered previously deportable aliens immune. *United*

* We are indebted to Messrs. Henry C. Lavine, Jack Wasserman and David Carliner for this material heretofore briefed by them for Your Honors in *Lehmann* v. *Carson*, 353 U.S. 685.

States v. Reisinger, 128 U.S. 398, 480 (1888). Accordingly, to cover deportable aliens under pre-existing law, it was necessary to provide in section 241(d) that the grounds of deportation be retroactive. This was the purpose of section 241(d) as revealed by its legislative history. Aliens deportable under pre-existing laws were to remain deportable. S. 3455 further reveals that 241(d) was there set forth as in the final version of the law. It was not drafted to carve out a savings clause exemption because when it was prepared, there was no savings clause for deportation cases.

2. *S. 716, 82nd Congress, 1st Session.* S. 716 removed the savings clause from the nationality section of the bill and placed it in section 405, making it applicable to the entire Act, rather than to the nationality section alone.

To the repealing section (403) was added a paragraph (b) reading:

> "Except as otherwise provided in section 405, all other laws, in conflict or inconsistent with this Act are, to the extent of such conflict or inconsistency repealed."

To section 405 there was added the phrase "right in process of acquisition." In addition the following were also to be preserved under the old law:

> "warrant of arrest, order or warrant of deportation, order of exclusion, or other documents or proceeding which shall be valid at the time this Act shall take effect. . . ."

3. *S. 2550, 82nd Congress, 2d Session.* S. 2550 added a further sentence to the savings to the savings clause reading as follows:

> "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the effective date of this Act, shall be regarded as a proceeding within the meaning of this subsection."

The 1952 Savings Clause Is the Broadest Ever Enacted by Congress.

1. The foregoing analysis of the successive stages through which the 1952 savings clause passed in the various drafts of the bills which led to the enactment of the 1952 Immigration and Nationality Act shows that each bill enlarged the savings clause. From a savings clause limited to nationality matters, it was expanded into one covering the whole field of immigration and nationality. From a bill limited to proceedings, acts, things, and matters, it was expanded to one covering warrants of arrest, orders of deportation and exclusion, suspension and displaced persons' applications, statuses, conditions, and rights in process of acquisition.

2. The history of other immigration and nationality savings clauses outlined in *United States* v. *Menasche*, 348 U.S. 528 at 532 (1954), demonstrates, as this Honorable Court concluded, that the:

> "1952 Act made the enumeration of matters preserved • • • more complete and all inclusive"

and that the

> "consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress." 348 U.S. at 533, 535.

Judge Stewart in *United States* v. *Kershner*, 228 F. 2d 142, 146, said:

> "Other federal courts have uniformly given a broad interpretation to section 405 in varying factual situations. See *United States ex rel. DeLucia* v. *O'Rourke*, 213 F. (2d) 759 (8 Cir., 1954); *Yanish* v. *Barber*, 211 F. (2d) 467 (9 Cir., 1954); *Ex parte Robles-Rubio*, 119

F. Supp. 610 (N.D. Cal., 1954); *Vanish* v. *Barber*, 128 F. Supp. 240 (N.D. Cal., 1955); *Petition of Pringle*, 122 F. Supp. 90 (E.D. Va., 1953), affirmed *per curiam sub nom. United States* v. *Pringle*, 212 F. (2d) 878 (4 Cir., 1954). On occasion, this uniformly broad interpretation has led to a result adverse to the alien. See *United States* v. *Matles-Freidman*, 115 F. Supp. 261 (E.D.N.Y., 1953); *United States ex rel. Circella* v. *Neely*, 115 F. Supp. 615, 625-626 (N.D. Ill., 1953)."

• • •

"Moreover, if there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in his favor. *Fong Haw Tan* v. *Phelan*, 1948, 333 U.S. 6, 10."

One issue here is whether Congress has preserved petitioner's residence in Chicago or taken it away. Petitioner not only resided here, he filed his Declaration of Intention in 1925 (App. 267) and his Preliminary Form for Naturalization in 1928 (App. 206). A conflict in derivative citizenship cases was between *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause "a mere condition unattended by any affirmative action by the alien or by anyone else," and *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C.A.D.C., 1949), which reached a contrary result.

We quote from *United States* v. *Menasche*, 348 U.S. 528, 535:

"It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi*, involved a situation where the alien had failed to take any affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress was willing to preserve a 'mere condition unattended by any affirmative action,' we think its savings clause also reaches

instances, such as this, where affirmative action is present. * * * (536) It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to this right under § 405 (a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in §405(a), derived verbatim from §347(a) of the 1940 Act, preserving the 'validity' of the declarations of intention 'valid at the time this Act shall take effect.' "

By the provisions of Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) Congress expressly limited deportation of illegal entrants to a period within five years after entry. In the same manner Congress relieved from deportation those aliens convicted of crime, who had been pardoned. The savings clause, which expressly preserved any existing status or condition and which expressly continued in effect as to such status or condition the Act of 1917, represents a reaffirmation by Congress of its policy "not to strip aliens of advantages gained under prior laws." *United States* v. *Menasche*, 348 U.S. 535.

The term status has a long history in immigration terminology, and it is rich in legal meaning. "Whenever a condition in life is determined by law, and not by act of the parties it is correctly denominated a status in jurisprudence; and even in the terminology of the common law itself." *In re Zeigler*, 143 N.Y.S. 562, 567, 82 Misc. 346 (1913). There is the status of husband and wife, marital status, the status of parent and child, of adoption and guardianship. *Restatement of Conflict of Laws*, p. 181, 182. We speak of the status of an alien, *Harisiades* v. *Shaugh-*

nessy, 342 U.S. 580, 586 (1951), enemy alien status, *Shomberg* v. *United States*, 348 U.S. 540, 547 footnote 5 (1954), *the status of citizenship or eligibility for citizenship Heikkila* v. *Barber*, 345 U.S. 229, 236 (1952), the status of a continuous resident (alien) physically present in the United States, *Kwong Chew* v. *Colding*, 344 U.S. 590, 600, 601 (1950) and legal status to institute or maintain a lawsuit. *Doremus* v. *Board of Education*, 342 U.S. 429, 436 (1951).

The term is no stranger to those familiar with our immigration laws and practices. For years our immigration authorities have maintained a status section in its Washington and district offices charged primarily with supervision of the status of aliens here on temporary basis. *Immigration Manual* (1946), p. 1011. As early as 1926 immigration regulations were concerned with the status of visiting aliens, *U.S. ex rel. Lam Shin Hing* v. *Corsi*, 4 F. Supp. 591, 593 (S.D.N.Y., 1933). Immigration decisions speak of status as an alien, *Matter of C., V, I&N* Dec. 370, 371; diplomatic status, *Matter of S.H.C.C.IV, I&N*. Dec. 36, 42; status as a student visitor, *Matter of A.I.C. IV, I&N*. Dec. 630, 631; and non-immigrant status, *Matter of DeP., I&N*. Dec. 151.

Senate Report 1515, 81st Congress, 2d Session, p. 491, which preceded the introduction of the bills culminating in the 1952 Immigration and Nationality Act, devotes a chapter to "adjustment of status." It is there stated:

> "Legality of status is a matter of degree. Most aliens in this country are here lawfully for all purposes. A few are eligible for re-entry documents, but do not have status sufficient for naturalization purposes; a large number are eligible neither for naturalization nor re-entry documents, but still are not deportable; and many are subject to deportation,

yet eligible to have that status changed without deportation.'

"Status may be adjusted by administrative procedure, treaty, registry, suspension of deportation, voluntary departure or preexamination, change of status, or an act of Congress."

Thus, Congress, itself, placed aliens subject to deportation in a status. By the same token those not deportable had a status and it is significant that the 1952 Immigration and Nationality Act, and particularly the immigration sections frequently use the term status.

Of course, with or without express authority from Congress, courts would recognize a change of status recognized and established by a Naturalization Court.

Section 101(a)(20) (8 U.S.C. 1101) (a) (20) refers to the status of lawful permanent residence, section 101 (a) (27) (c) (8 U.S.C. 1101) (a) (27) (c) to non quota status, and section 204 (8 U.S.C. 1154) to immigrant status.

Chapter 5 which precedes section 241 (8 U.S.C. 1251) is headed "Deportation; Adjustment of Status." Section 241 (a) (9) (8 U.S.C. 1251) (a) (9) provides for the deportation of aliens who have violated their status as nonimmigrants. Section 244 (8 U.S.C. 1254) authorizes the adjustment of status of deportable aliens. Sections 245 and 246 (8 U.S.C. 1255, 1256) provide for the adjustment of status from nonimmigrant to permanent resident and the rescission of such adjustment. Section 247 (8 U.S.C. 1257) authorizes the adjustment of status from permanent resident to non-immigrant. Section 360 (a) (8 U.S.C. 1503a) refers to the status of a national of the United States. Finally, the 1952 Act savings clause itself preserves applications for adjustment of status under the Displaced Persons Act (50 U.S.C. App. 1953).

Existing Conditions Preserved.

The 1952 savings clause preserves pre existing conditions. If petitioner did not acquire a status, certainly the preservation of his condition of nondeportability is covered by the savings clause. Condition is defined by lexicographers as meaning "state of being," "characteristics" or "situation in relation to environment." *

It frequently is employed legally to denote a circumstance or situations. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 630 (C.A. 3, 1953). It has been described as a word of flexible meaning and indefinite application. *Great Eastern Casualty Co.* v. *Smith*, 174 S.W. 687, 688 (Tex. Civ. App. 1915). The elasticity of the term "condition" in the context of the savings clause here involved, certainly encompasses petitioner's situation of nondeportability.

Existing Rights in Process of Acquisition Preserved.

In *Bertoldi* v. *McGrath*, 178 F. 2d 977, a savings clause of more narrow scope was held to cover inchoate rights or those in process of acquisition.

This Honorable Court observed in *United States* v. *Menasche*, 348 U.S. 528, 535, that under the savings clause the statutory status quo was to continue to rights not fully matured." In *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578, 580 (C.A. 2, 1955), an alien illegally in the United States was held to have a status or right in process of acquisition by reason of steps taken by his wife to secure a visa. Petitioner's position is stronger. Unlike Zacharias who was deportable under existing law, petitioner had acquired a status or condition of nondeportability. He had a long residence here. By appropriate

* Websters Universal Dictionary, Oxford Universal English Dictionary.

further status he could and still can utilize that residence and nondeportable status for naturalization purposes. Moreover, Congress continued its desire to accord favored treatment to aliens who had come here as petitioner did, prior to 1924.

It is unreasonable to suppose that Congress would reverse its long standing policy towards excludable aliens who entered this country prior to July 1, 1924, otherwise than by a plain and specific declaration of its purpose to do so. *U. S. ex rel. Scoria* v. *Lehmann*, 136 F. Supp. 462. Such aliens have been permitted to become lawful permanent residents by registry proceedings under 8 U.S.C. 728 b (1946 Ed.) and 8 U.S.C. 1259 (1952 Ed.)

Accordingly, warrants of deportation under the prior law issued after a deportation case was finally determined (8 C.F.R. 1952 Ed. 243. 1) were specifically preserved. Warrants of arrests initiating the deportation proceeding (8 C.F.R. 1952 Ed. 242. 1) were specifically kept in force under the old law under the savings clause. The deportation proceeding itself and statuses were likewise preserved. The savings clause specifically reads that unless otherwise specifically provided, nothing shall affect the validity of any

> "warrant to arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect."

Valid at the time the McCarran Act took effect was a proceeding for the naturalization of petitioner, together with the necessary documents to support steps taken by petitioner in order to become a citizen.

The Retroactive Deportation Provisions of Section 241 Specifically Provide an Exception to the Savings Clause.

It is our view that section 241 (8 U.S.C. 1251) of the 1952 Immigration and Nationality Act did not otherwise specifically provide for the deportation of those protected by the savings clause. Some provisions of section 241 are retroactive and others are not.

Where prospective application of section 241 was desired, the word "hereafter" was used. Except as provided in section 241, section 241 (d) made the deportation provisions retroactive. However, we do not reach the retroactive provisions of the new law unless the new law applies. We must, therefore, first determine which law is applicable. The savings clause preserves the statutory *status quo* and prevents the operation of the 1952 Act unless "otherwise specifically provided." *United States* v. *Menasche*, 348 U.S. 528, *Shomberg* v. *United States*, 348 U.S. 540. The heart of the issue herein, then, is not whether section 241 is retroactive, but rather whether the old or the new law governs. Stated otherwise, the issue is whether the mere retroactivity of section 241 (d) constitutes sufficient specificity to preclude operation of the savings clause.

Means of Words "Otherwise Specifically Provided."

In section 403(b) Congress stated that section 405 applied "except as otherwise provided." In the Nationality Act of 1940, 8 U.S.C. 747 a, the savings clause applied, "unless otherwise provided." However, in enacting section 405 Congress twice stated that it was to apply" unless otherwise *specifically provided*." Unless otherwise *specifically* provided, the prior legislation was to govern. Unless otherwise *specifically* provided the existing status, condition, and right in process of acquisition were to remain valid.

The word, "specifically," meant something to Congress when it added it to the savings clause and when it inserted it in section 405 and not in section 403, or in other legislation. It is a term which demands precision. The word "specifically" as defined by the lexicographers and judicial decisions is equivalent to the word "precisely" or "expressly."*

Section 241 is not precise in carving an exception to the savings clause. On the contrary, it makes no reference to if at all. It is not explicit in directing whether aliens who have acquired an adjusted status or a nondeportable status under prior legislation and under judicial recommendations are not to become deportable. *U. S. ex rel. DeLuca v. O'Rourke*, 213 F. 759 (C.A. 8 1954); *U. S. ex rel. Carson v. Kershner*, 228 F. 2d 142 (C.A. 6, 1955); *U. S. ex rel. Scoria v. Lehmann*, 136 F. Supp. 458 (N.D. Ohio, 1955).

Legislative History of Omission of Explicit Exception to Section 405.

Section 241 did not and could not specifically suspend the operation of the savings clause when it was originally drafted. In its original form, S. 3455, 81st Congress, 1st Session, contained Section 241(d), but no deportation sav-

---

* Specifically means in a specific manner, explicitly, particularly, definitely. *Straton v. Hodgkins*, 109 W. Va. 536, 155 S.E. 902 (1930). "Specific implies precise or explicit designation." *Melnick v. Melnick*, 147 Pa. Supp. 564, 25 A.2d 111 (1942). Specific means precisely formulated or restricted, definite, explicit, or an exact or particular nature. *People v. Thomas*, 25 Cal. 2d 880, 889, 156 P. 2d 7, 17 (1945). "The word 'specifically' is equivalent to the word 'definitely' or 'precisely'." *Emack v. Campbell*, 14 App. D.C. 186, 190 (1889).

The Century Dictionary and Encyclopedia defines specifically as meaning "particularly, definitely, explicitly." Funk and Wagnalls Standard Dictionary defines it as "expressly, explicitly, particularly, definitely."

ings clause. The savings clause for deportation cases was inserted in subsequent drafts. Nevertheless, after the savings clause was added and expanded in these subsequent drafts of the bill, no attempt was made to have 241(d) explicitly carve an exception to 405 by a cross reference to that section. The omission of any cross reference or explicit exception to section 405 is significant.

Statutory Scheme For Exemption From Savings Clause.

In the drafts which followed S. 3455 Congress methodically reviewed the various statutory provisions of the 1952 Act and carved out exceptions. In *Shomberg v. United States*, 348 U.S. 540 at 547 (1954), this Honorable Court noted that Congress had established a statutory scheme which exempted certain provisions of the Act from the operation of the savings clause. In each case Congress specifically provided for such exemption by the language "notwithstanding the provisions of section 405 of the Act." This Honorable Court, in *Shomberg v. United States*, 348 U.S. 540, 547, listed the sections exempt from section 405 as follows: Section 311 (8 U.S.C. 1422); Section 313(a) (8 U.S.C. 1421 a); 315 (a) (8 U.S.C. 1426 a); 318 (8 U.S.C. 1429); and 331(d) (8 U.S.C. 1442 d).*

---

* Section 311 provides that the right to naturalization shall not be abridged because of race, sex or marriage, and, "notwithstanding section 405 (b) this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this Act." 66 Stat. 239, 8 U.S.C. 1422, 8 U.S.C. 1422.

Section 313(a) states "Notwithstanding the provisions of section 405 (b), no person shall hereafter be naturalized" who engages in specified subversive activities or who is a member of described subversive organizations. 66 Stat. 240, 8 U.S.C. 1424 (a), 8 U.S.C. 1424(a).

Section 315 (a) provides "Notwithstanding the provisions of section 405(b)", one who claims or has claimed his alienage and "is or was" thereby relieved of service in the armed forces, "shall be

The fact that Congress said explicitly and clearly what it meant in these sections with reference to avoiding the savings clause is strong evidence that it did not mean what it did not "precisely or "explicitly" say in section 241(d).

As Mr. Justice Holmes said in *United States* v. *Atchison T. & S.F.R.Co.*, 220 U.S. 37 (1910):

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied . . . We see no reason to suppose that Congress meant more than it said."

The presence of the phrase, "notwithstanding section 405," in sections 311, 313, 315 (a), 318 and 331 (d) and its absence from section 241 (d) should foreclose reading it by implication into the section from which it is absent. The difference in language indicates a difference in legislative intention. *Brewster* v. *Gage*, 280 U.S. 327, 336 (1929); *Crawford* v. *Burke*, 195 U.S. 176 (1904); *Pixie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, 448 (1900).

Shomberg v. *United States*, 348 U.S. 540 is not to the contrary as petitioner asserts. On the contrary it supports our view. Congress in section 318 specifically carved out an exception to section 405 (b) by using the notwithstanding language. Aliens found deportable were not to be naturalized under the Internal Security Act,

---

permanently ineligible to become a citizen." 66 Stat. 242, 8 U.S.C. 1426 (a), 8 U.S.C.A. 1426(a).

Section 318 provides in part: "Notwithstanding the provisions of section 405(b), and except as provided in section 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other act . . . " 66 Stat. 244, 8 U.S.C. 1429, 8 U.S.C.A. 1429.

Section 331(d) provides for the ending of enemy alien status and states: "Notwithstanding the provisions of section 405(b), this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this Act and which is still pending on that date." 66 Stat. 252, 8 U.S.C. 1442(d), 8 U.S.C.A. 1442(d).

8 U.S.C. 729 (c), 64 Stat. 1015 which was existing law, nor under the new law. The specific exemption from 405 (b) which expressly covered naturalization proceedings was sufficient to carry an exemption from the entire savings clause and particularly from section 405(a). This Honorable Court made it quite clear, however, that in the absence of a specific provision to the contrary, the savings clause prevailed. It said (348 U.S. at 543):

> "We agree with petitioner that absent a specific provision to the contrary, he has rights protected by §405 (a). . . . But we hold that §318 specifically excepts rights under the prior law from the protection of §405, when these rights stem from a petition for **naturalization process.**"

In a footnote to the last quoted sentence, this Court proceeded to leave open the question here presented saying:

> "This is not to say that petitioner cannot challenge the authority of the Attorney General to deport him under §244(a) of the 1952 Act. We express no opinion as to whether such a challenge, grounded on the savings clause or otherwise, might succeed if made in the deportation proceedings."

Petitioner's status is governed by two "specific provision" requirements set forth in the savings clause. One relates to the status or condition of the alien. Unless otherwise specifically provided, nothing contained in the 1952 Act shall be construed *to affect any status (or) condition existing* on the effective date of the Act.

The second provision, which reinforces the first, relates to the continued effectiveness of the prior law. As to all such statutes or conditions, *the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect.*

Thus, the savings clause demands specific language not merely to "affect" the petitioner's status, but also de-

mands a specific provision stating that the prior law is not continued in force and effect.

In view of these linked provisions, the familiar rule of statutory construction required that the general language which had been used to encompass all of the numerous classes of aliens described in section 241(a), must succumb, even were there a conflict to the specific provisions of the savings clause.

As this Honorable Court declared in *MacEvoy* v. *United States*, 322 U.S. 102 (1943):

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which might otherwise be controling.' *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1931)."

In *National Labor Relations Board* v. *Jones and Laughlin*, 301 U.S. 1, 30 (1936) this Court stated the same principle:

> "(Courts) are not at liberty to deny effect to specific provisions which Congress has the contitutional power to enact, by superimposing upon them inferences from general legislative declaration of an ambiguous character, even if found in the same statute. *The cardinal principle of statutory construction is to save and not to destroy.*" (Italics supplied.)

The cases which have given detailed analysis to the problem have found the necessary specificity wanting in section 241(d). *U.S. ex rel DeLuca* v. *O'Rourke*, 213 F. 2d 759, 764 (C.A. 8, 1954) holds 241 (d) not sufficiently specific to disturb non deportable status obtained through judicial recommendation against deportation. In the light of the Congressional policy to preserve for aliens advantages acquired under prior legislation, and in the light of

the use by Congress of such express language as "notwithstanding section 405," we submit that no language short of an equally express statement should be held to overcome the savings clause.

Policy of Preservation.

"The cardinal principle of statutory construction is to save and not to destroy." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1936). Accord, *United States* v. *Menasche*, 348 at 538 (1954).

Congress intended to preserve the thousands of prior law adjustments of status acquired through suspension of deportation, preexamination, registry, and under the Displaced Persons Act. This Court should similarly uphold the Congressional intention to preserve rather than to destroy the statutory status quo and the nondeportable status here involved.

Giving Effect to All Parts of the 1952 Statute.

It is the Court's duty "to give effect, if possible, to every clause and word of a statute," *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882).

We quote from *Shomberg* v. *United States*, 348 U.S. 540, 546:

> "If the grounds for deportation are the same under the prior law as under the new Act, then nothing in the new Act affects petitioner; it is clear that rights under the savings clause have not been infringed even if there is no specific exemption. Only where something in the new law introduces a change, *thereby affecting one's status under the old law*, is the savings clause called into play. Only then is a specific exception to §405 required." 348 U.S. 546 (Italics supplied.)

We again quote from Judge Stewart in *United States* v. *Kerschner*, 228 F. 2d 142, 147:

> "On the other hand, the conclusion we have reached does no violence to the provisions of section 241(d) of the Act, 8 U.S.C.A. §1251(d), making the provisions as to deportability contained in section 241 applicable even though the alien entered the United States or that the other facts which make him deportable occurred prior to the passage of the Act. It must be remembered that section 403 of the 1952 Act expressly repealed the predecessor statutes, among them specifically the 1917 and 1924 Act. The purpose and effect of section 241(d) is therefore to remove any doubt that the provisions of the Act as to deportation shall have retrospective as well as prospective application insofar as they are not superseded by the savings provisions of section 405. For example, we can assume without deciding that section 241(a) (1) 8 U.S.C.A. §1251 (a) (1), would serve to make an alien deportable who entered the United States as a stowaway subsequent to July 1, 1924."

Judge Stewart placed the following in a footnote, p. 147:

> "The Immigration Act of 1924, 8 U.S.C.A. §201 *et seq.*, effective July 1, 1924, did not contain a limitation period on deportability. Section 14 of the Immigration Act of 1924, 43 Stat. 162, 8 U.S.C.A. (1934 Ed.) §214. Therefore, an alien entering as a stowaway after that date could acquire no immunity to deportation by the passage of time. Although that section has now been repealed by the 1952 Act, such stowaway would presumably be deportable by reason of the cited sections of the 1952 Act."

We submit that through the retroactive deportation provisions of the 1952 Act, aliens deportable under prior laws whose presence here was not detected on December 24, 1952, continued to be deportable despite the repeal of those laws. On the other hand, those who acquired a nondeportable status under the prior laws had such status preserved. In this way an effect will be given to all parts of the statute.

APPENDIX F.

Excerpt from Carson Brief.

"The issue is not whether respondent acquired a vested right to remain here. This Court sustained the power of Congress to retroactively deprive an alien of his residence here in *Marcello* v. *Bonds*, 349 U.S. 302 (1954).

The issue, however, is whether Congress through its statutory enactment has preserved respondent's residence here or taken it away. As we have indicated above, the present controversy can be solved by determining whether the old law or the new applies without defining the terms 'status, condition, or right in process of acquisition.' It should be observed, moreover, that although these terms were originally inserted to resolve a conflict in derivative citizenship cases as petitioner asserts (No. 72, p. 21), when the savings clause was expanded to cover deportation cases, it was no longer so limited (see Point II(A), *supra*).

This conflict in derivative citizenship cases was between *U. S. ex rel. Aberasturi* v. *Cain*, 147 F. 2d 449 (C.A. 2, 1945), which declined to preserve under the 1940 savings clause 'a mere condition unattended by any affirmative action by the alien or by anyone else,' and *Bertoldi* v. *McGrath*, 178 F. 2d 977 (C.A.D.C. 1949), which reached a contrary result. The present savings clause is, as petitioner admits, 'an obvious attempt to overcome the *Aberasturi* case.' (Brief, No. 435, p. 22, footnote 11). Accordingly, this Court observed in *United States* v. *Menasche*, 348 U.S. at 535:

> 'It should be noted, further, that the conflict between *Aberasturi* and *Bertoldi* involved a situation where the alien had failed to take any affirmative action to assert his claim to citizenship. Even the more restrictive *Aberasturi* opinion recognized that affirmative action by the alien might alter the result there reached. 147 F. 2d at 542. If Congress

was willing to preserve a mere condition unattended by any affirmative action, we think its savings clause also reaches instances, such as this, where affirmative action is present.'

Petitioner's argument that some affirmative action was required to preserve respondent's status, therefore, can not be sustained."

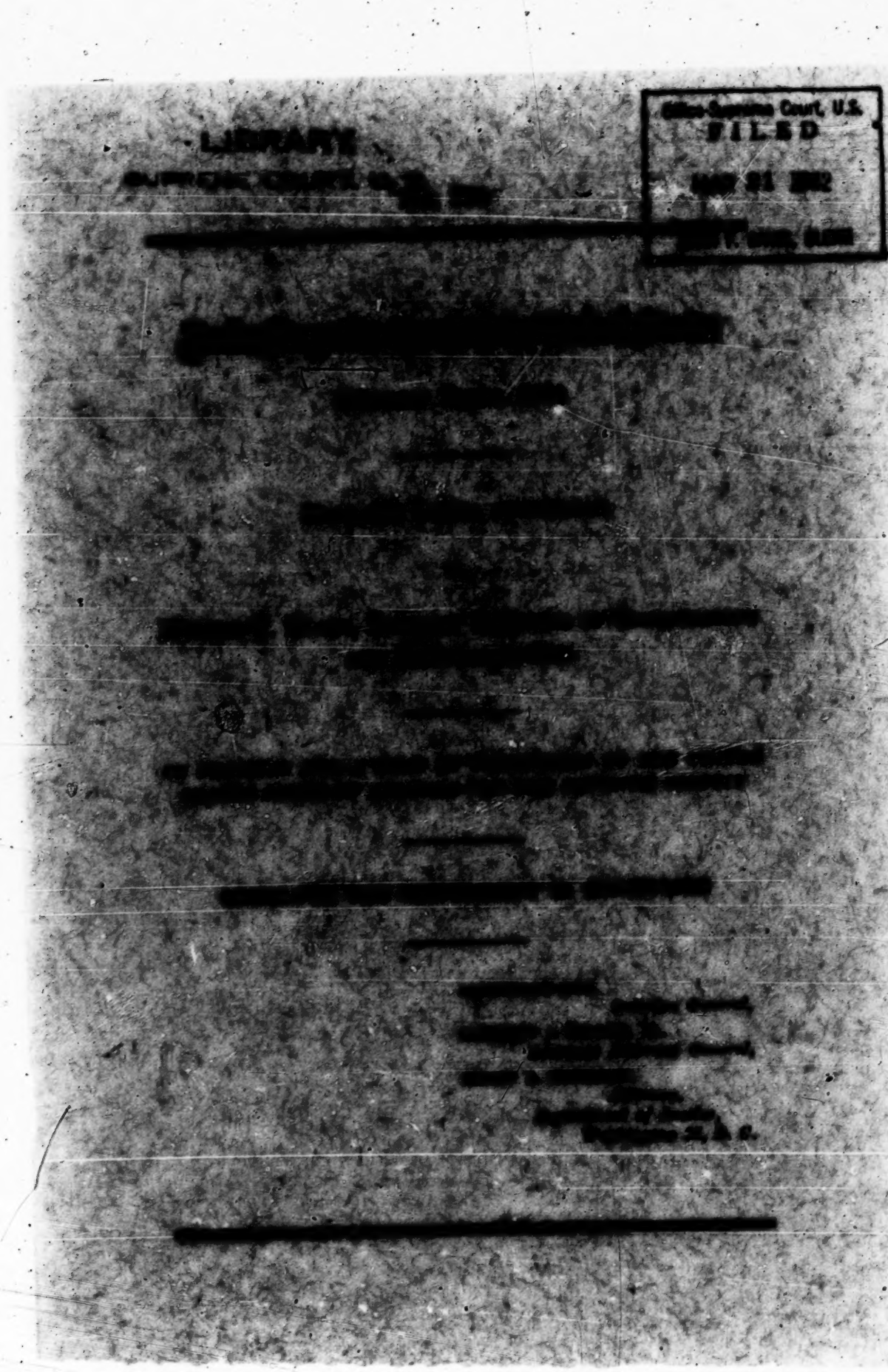
APPENDIX G

Federal Rule of Civil Procedure

Rule 60. Relief from Judgment or Order.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an in

dependent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela*, and bills of review and the bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules are by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.


Office-Supreme Court, U.S.
FILED

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes, regulations and rule involved	3
Statement	3
1. The denaturalization proceeding	3
2. The deportation proceeding	4
3. The order of deportation and opinion of the Special Inquiry Officer	10
4. The appeal to the Board of Immigration Appeals and the judicial review proceedings	11
Argument	12
Conclusion	20
Appendix	21

CITATIONS

Cases:

Anselmo v. Hardin, 253 F. 2d 165	14
Lehmann v. Carson, 353 U.S. 685	12-13
Mulcahey v. Catalabotte, 353 U.S. 692	12-13
Pilliss v. Smith, 46 F. 2d 769	17
Schneiderman v. United States, 320 U.S. 118	18
United States ex rel. Allessio v. Day, 42 F. 2d 217	17
United States v. De Lucia, 163 F. Supp. 36	3, 4
United States v. De Lucia, 256 F. 2d 487, certiorari denied, 358 U.S. 836	3, 18
United States ex rel. Sollano v. Deale, 5 F. Supp. 561, affirmed, 68 F. 2d 1019	17
United States v. Stromberg, 227 F. 2d 903	19
United States ex rel. Zacharias v. Shaughnessy, 221 F. 2d 578	13

Statutes, Regulations and Rule:

Administrative Procedure Act, Sec. 10 (5 U.S.C. 1009)	12
Immigration Act of February 5, 1917, Sec. 3, 39 Stat. 875 (8 U.S.C. [1926 ed.] 136)	3, 5, 11, 23

Statutes, Regulations and Rule—Continued

	Page
Immigration and Nationality Act of June 27, 1952, 66 Stat. 163:	
Sec. 241 (8 U.S.C. 1251)	3, 4, 11, 13, 21
Sec. 291 (8 U.S.C. 1361)	15
Sec. 340 (8 U.S.C. 1451)	3
Sec. 405 (8 U.S.C. 1101, Note)	3, 12, 21
Passport Act of May 22, 1918, 40 Stat. 559:	
Sec. 1	3, 22
Sec. 3	3, 23
28 U.S.C. 2201	5, 12
Executive Order No. 2932 of August 8, 1918	3, 11, 23
Joint Order of the Department of State and the Department of Labor issued July 26, 1917	3, 24
Rule 60 (b), F.R. Civ. P.	3, 18, 25
Miscellaneous:	
Davis, *Administrative Law* (1951), §§ 150 *et seq.*	17

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 733

PAUL DE LUCIA, PETITIONER

v.

WILBUR T. FLAGG, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 845-851) is reported at 297 F. 2d 58. The opinion of the district court (A.[1] 246-263; Pet. App. 827-844) is unreported.

---

[1] "A." refers to the Appendix to petitioner's brief in the court of appeals, consisting of portions of the record. It is on file with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1961, and a petition for rehearing was denied on January 11, 1962. The petition for a writ of certiorari was filed on February 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had a "status of nondeportability" at the time of the passage of the Immigration and Nationality Act of 1952, which was preserved by the Act's saving clause.

2. Whether the judgment admitting petitioner to citizenship, which was revoked for fraud in the procurement, rendered the lawfulness of petitioner's entry into the country *res judicata*.

3. Whether the hearing officer at the deportation proceeding improperly placed upon petitioner the burden of proving that his entry was lawful.

4. Whether the hearing officer relied upon an adverse inference from petitioner's claim of the privilege against self-incrimination.

5. Whether it was proper for the hearing officer to examine provisions of the Italian Penal Code, referred to in a record of conviction which was in evidence, in order to verify that the crime was one involving moral turpitude.

6. Whether petitioner's motion for leave to file a petition under Rule 60(b), F.R. Civ. P., for relief from the judgment of denaturalization was properly denied.

STATUTES, REGULATIONS AND RULE INVOLVED

Relevant portions of Sections 241(a)(1) & (d) and 405 of the Immigration and Nationality Act of 1952, 66 Stat. 204, 208, 280, 8 U.S.C. 1251(a)(1) & (d) and 1101, Note; Sections 1 and 3 of the Passport Act of 1918, 40 Stat. 559; Section 3 of the Immigration Act of 1917, 39 Stat. 875; Sections 5 and 31 of Executive Order No. 2932 of August 8, 1918; the Joint Order of the Departments of State and Labor issued July 26, 1917; and Rule 60(b) of the Federal Rules of Civil Procedure, are set forth in the Appendix, *infra*, pp. 21-26.

STATEMENT

1. *The denaturalization proceeding.*—Petitioner, a native of Italy, entered this country on August 12, 1920, and was naturalized in the United States District Court for the Northern District of Illinois on September 27, 1928 (A. 108, 216-217, 219). On October 10, 1956, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a), denaturalization proceedings were commenced in the same court, the complaint charging that the order and certificate of naturalization had been procured through willful misrepresentations and the concealment of material facts (A. 133-137, 246-248). Following a trial before the court (La Buy, D.J.), a decree of denaturalization was entered on June 11, 1957 (A. 244-245), *United States* v. *De Lucia*, 163 F. Supp. 36 (Pet. App. 801-812). On June 18, 1958, the judgment of denaturalization was affirmed. *United States* v. *De Lucia*, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836 (Pet. App. 813-822).

The evidence at the denaturalization trial, which was reviewed in detail in Judge La Buy's opinion (163 F. Supp. 36; Pet. App. 801-812), showed, in brief, that petitioner's true original name was Felice De Lucia (163 F. Supp. at 38-40; Pet. App. 805-809); that he was convicted of voluntary homicide in Naples, Italy, on May 18, 1917 (A. 224-225); that he "falsely assumed the name of Paul Maglio to enter this country" (163 F. Supp. at 38; Pet. App. 805); that he again falsely stated his name to be Paul Maglio in applying for citizenship and thereby "committed perjury * * *" and "* * * a fraud on the court" (163 F. Supp. at 38; Pet. App. 805; A. 205, 207, 209, 212, 214)[*]; and that he further falsely represented in the naturalization proceedings that he had never been arrested (A. 146, 211, 224-225, 227).

2. *The deportation proceeding.* On December 10, 1958 (A. 107), petitioner was served with an order to show cause (A. 84-85) why he should not be deported pursuant to Section 241(a)(4) of the Immigration and Nationality Act of 1952 (Appendix, *infra*, p. 2a), as an alien who, at the time of entry, was within one or more of the classes of aliens excludable by the law existing at the time of entry. It was charged that at the

[*] At petitioner's request (A. 209), the court of naturalization, on the occasion of his admission to citizenship, changed his name from Paul Maglio, which he had represented his true name to be, to Paul De Lucia, the name by which he has since been known (A. 219). The reason for the court's action was that petitioner had represented to the court in his naturalization papers that he "got married" under the name Paul De Lucia on his entry in 1927, that he [illegible] that name, and that he desired to adopt it legally (A. 207, 208, 209).

time of his entry in August 1920 he was excludable on each of two grounds: (1) failure to have in his possession a passport or other travel document showing his identity, as required by the Passport Act of May 22, 1918, and Executive Order No. 2932 of August 8, 1918, issued pursuant thereto (Appendix, *infra*, pp. 22-23, 23-24), and (2) prior conviction of a crime involving moral turpitude, voluntary homicide, by which he was excludable under Section 3 of the Immigration Act of February 5, 1917 (Appendix, *infra*, p. 23).

On January 6, 1959, a hearing was held on the order to show cause before a Special Inquiry Officer (A. 85-106). By stipulation of counsel, the transcript of the testimony and the exhibits received in the denaturalization proceedings, with certain immaterial exceptions, were made part of the record (A. 88, 92, 97-99).[1] In addition, certain evidence which was not adduced in the denaturalization proceedings was received in the deportation proceeding (A. 88-92). Petitioner, through his counsel, admitted that he was an alien and a native of Italy and that he had last entered the United States on August 12, 1920 (A. 86-87). He declined to answer further questions put to him by the examining officer concerning the circumstances of his entry, claiming the privilege against self-incrimination (A. 99-100).

[1] Petitioner was asked under what name he entered the United States at the time he was at first alleged to have entered the United States under the name of Paolo Miglio and whether he denied that his true name was Lelio D. Luca

The evidence presented by the government, which is reviewed in detail in the opinion of the Special Inquiry Officer (A. 110-123), may be summarized as follows:

(a) *The evidence that petitioner, whose true name was Felice De Lucia, entered the United States under a false passport identifying him as Paul Maglio.*—In an alien registration form executed by petitioner on November 20, 1958 (Exhibit A-53), petitioner stated that he entered the United States under the name of Paul Maglio and that he last arrived in the United States at the port of New York in August 1920 on the S.S. Ryndam (A. 110). In his petition for naturalization, dated April 10, 1928, and in the preliminary form for petition for naturalization, dated February 21, 1928, petitioner stated that his name was Paul Maglio; that he arrived at the port of New York on August 10, 1920, on the Ryndam; that he was born in Apricena, Italy, on July 10, 1898; and that his mother's name was Nunzia Maria Torelli (A. 110, 207, 212). In the preliminary form for petition for naturalization, petitioner stated that he had used, and was then using, the name Paul De Lucia "because I got married on that name," and that he desired to have his name changed to Paul De Lucia (A. 110, 207, 209). When a certificate of naturalization was issued to petitioner on September 27, 1928, it was issued in the name of Paul De Lucia and the certificate contained a notation that, by order of the court, his name was changed to Paul De Lucia from Paul Maglio (A. 110, 216-217, 219).

A witness, Paul Maglio (not the petitioner), testified that he was born in Apricena, Italy, on July 10, 1898;

that his mother's name was Nunzia Maria Clotilde Torelli; that he entered the United States on August 3, 1920; that he resided in Apricena from the time of his birth until he came to the United States, except for a period of approximately three years, during which he served in the Italian army; that he had been employed in the City Hall in Apricena, taking care of the birth and death records; that Apricena had a population of about 6,000 persons when he left there; that no one named Paul Maglio lived there except himself; and that no family named Maglio lived there except his own (A. 140-142, 147-148). He further testified that petitioner was not related to him and that he had never seen him before (A. 142, 148).[4] A cousin of the witness, Alfonso Torelli, who lived in Apricena for twenty years before emigrating to the United States in 1920, corroborated various details of the witness's testimony, including his testimony that "[o]nly one Maglio family and only one Paul Maglio" lived in Apricena (A. 142, 149). Torelli, like Maglio, had never seen petitioner before (A. 142-143, 149).

It was established through Italian birth records that a son, Felice, was born to Antonio De Lucia and his

[4] The witness identified Exhibit 11K as the passport on which he had come to the United States. He testified that he received it in February 1920, that it was in his possession for about two months, that he gave it to a person who had a travel agency in Naples and who took care of all the people that came to the United States, including the making of arrangements for securing the "American Consul's visa," and that this person returned his passport to him the day before he departed from Italy for the United States (A. 148). The witness arrived in the United States at the port of New York nine days before petitioning (A. 141).

wife, Maria Annunziata, in Naples, Italy, on November 14, 1897; and that four daughters—Emilia Beatrice, Anna Clementina, Clementina Eleonora, and Luisa Maria—were born to the same couple in Ottaviano, Italy, between 1898 and 1907 (A. 117). In various documents signed by petitioner between 1927 and 1941, including a bank signature card and applications for insurance, he stated that he was born in Naples on November 14, 1897 (A. 114-115). In several instances, he gave July 1898 as the month of his birth and Naples as his place of birth (*ibid.*). The record of his marriage in Chicago in 1927 gave Naples as his place of birth and his parents' names as Anthony De Lucia and Mary Annunziata (A. 113-114, 119). In 1947, petitioner told an F.B.I. agent that he had four sisters living in Italy, named Anna, Louise, Emily, and Clementine, or Clementina (A. 118, 150).

Government Exhibit 7, the passenger manifest of the S.S. Ryndam on its arrival at the port of New York on August 12, 1920, listed as one of the arriving alien passengers a person named Paolo Maglio, aged 22, whose father was Enrico Maglio, and whose place of birth was Apricena, Italy (A. 268-269). It was stipulated at the deportation hearing that if one Edward Ferro, a retired immigrant inspector, were called as a witness, he would testify that he was familiar with the regular practice and procedure of inspecting aliens at New York on or about August 12, 1920; that there was a regular and standard procedure for checking the manifest record of arriving aliens against the aliens; that it was a part of the procedure, as reflected in a

written regulation which was read into the record, that if any alien was ordered held for special inquiry that fact was indicated by placing the letters "SI" in red ink opposite the alien's name on the manifest; that, if an alien whose name appeared on the manifest presented himself before the immigrant inspector either with no passport or with a passport in a name other than that shown on the manifest, the immigrant inspector would hold the alien for a Board of Special Inquiry and record the fact on the manifest; and that an examination of Government Exhibit 7 indicated that the alien referred to in it as Paolo Maglio had not been held for a Board of Special Inquiry (A. 90-92, 120-121).

(b) *The evidence that petitioner had been convicted of a crime involving moral turpitude prior to entry.* Exhibit 37, an excerpt from the registry of prisoners of the jail of S. Efremo, Naples, for the year 1915, records that Felice De Lucia, son of Antonio De Lucia and Maria Annunziata, born in Naples on November 14, 1897, was arrested on July 17, 1915, charged with attempted homicide and the infliction of serious wounds upon Emilio Perillo, and that he entered the prison on the latter date (A. 118, 227). Exhibit 36 is the record of the conviction of Felice De Lucia, son of Antonio, of Naples, in the Common Assize Court of Naples, on May 18, 1917, for voluntary homicide, "with grave provocation," on the person of Emilio Perillo, committed in Naples on July 17, 1915, for which he

The immigrant inspector whose signature appeared on the manifest was deceased at the time of the hearing (A. 91, 120).

was sentenced to three years' imprisonment, "reduced by 1/6th by reason of the extenuating circumstances" (A. 118, 224-225).*

3. *The order of deportation and opinion of the Special Inquiry Officer.* On January 26, 1959, the Special Inquiry Officer entered an order of deportation (A. 124) and an opinion (A. 107-124) finding petitioner deportable on both of the grounds alleged in the order to show cause. He found, on the basis of the foregoing facts and other evidence reviewed in the opinion, that petitioner "entered the United States in August 1920 by assuming the identity of Paolo Maglio and was not held for hearing before a Board of Special Inquiry"; that it was reasonable to conclude that at the time of his admission he "presented a passport in the name of Paolo Maglio and thereby gained entry into the United States"; that petitioner "is not Paolo Maglio and * * * is, in fact, Felice De Lucia"; that he therefore "did not present a passport showing his true identity", that "the passport presented did not con-

* The defendant was contemporaneously convicted of carrying a gun without a license "under extenuating circumstances" for which he received an additional sentence. The total sentence was imprisonment for two years, six months, and 16 days, plus a fine (A. 224-225).

On June 30, 1924 the same defendant was convicted *in absentia* by the Third Special Assize Court of Naples of another voluntary homicide, the killing of Vincenzo Capasso, for which he was sentenced to 21 years' imprisonment (A. 118, Ex. 38, A. 229-232). The record of the conviction indicates that the warrant of arrest had "remained ineffective * * * to date by reason of [the accused] having absconded" (A. 118-119, 230). The killing of Capasso occurred on June 17, 1920 (A. 118, 229), two months prior to petitioner's entry into this country under an assumed name (see p. 6).

stitute a passport within the provisions of" Executive Order No. 2932 (Appendix, *infra*, pp. 23-24), requiring each entering alien to present a valid passport showing "the identity and nationality of the individual for whose use it was issued"; that petitioner, accordingly, "at the time of his entry did not meet the requirements of Executive Order No. 2932 and he was not entitled to enter the United States under the provisions of the Passport Act of May 22, 1918 [Appendix, *infra*, pp. 22-23], and Executive Order No. 2932" (A. 121). He concluded that petitioner "was excludable at the time of his entry under the laws then existing," and that he was therefore deportable under Section 241(a)(1) and (d) of the Immigration and Nationality Act of 1952 (Appendix, *infra*, p. 21), "regardless of when the entry took place" (A. 121). The officer also concluded that petitioner was deportable on the additional and independent ground that at the time of his entry he was excludable under Section 3 of the Immigration Act of February 5, 1917 (Appendix, *infra*, p. 23) as an alien who had been convicted of a crime involving moral turpitude, *viz.*, voluntary homicide (A. 123).

In reaching these conclusions, the officer stated that "no inferences need be drawn from the [petitioner's] claim of the privilege against self-incrimination nor from his silence, and a finding of deportability is based solely on the evidence of the record" (A. 124).

4. *The appeal to the Board of Immigration Appeals and the judicial review proceedings.* On appeal by petitioner to the Board of Immigration Appeals, the

Board, on August 25, 1959, adopted in substance the findings and conclusions of the Special Inquiry Officer and dismissed the appeal (A. 129-132). The Special Inquiry Officer's discussion of the evidence was incorporated in the Board's opinion by reference (A. 131).

Petitioner thereafter filed in the District Court for the Northern District of Illinois, under 28 U.S.C. 2201 (authorizing declaratory judgments) and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009), a petition for review of the deportation order and for injunctive relief (A. 2-82), alleging among other things that the evidence was insufficient to support the order of deportation and that he was denied a fair hearing. The district court (Perry, D.J.), on February 24, 1961, entered an opinion and order granting a motion by the respondent District Director for summary judgment (A. 246-263; Pet. App. 827-844). The Seventh Circuit affirmed (Pet. App. 845-851).

ARGUMENT

1. Petitioner's contention (Pet. 36-37, 68-85) that he had a "status of nondeportability" at the time of the passage of the Immigration and Nationality Act of 1952, which was preserved by the Act's saving clause (Section 405(a); Appendix, *infra*, pp. 21-22), is answered by *Lehmann* v. *Carson*, 353 U.S. 685, and *Mulcahey* v. *Catalanotte*, 353 U.S. 692, in which like arguments were rejected by this Court. As pointed out in those cases, Section 405(a), by its terms, does not apply to situations "otherwise specifically provided" for in the Act (353 U.S. at 688; 353 U.S. at 694). Here, as in the

Lehmann case, Section 241(a)(1) and (d) of the Act (Appendix, *infra*, p. 21) does "otherwise specifically provide." Subsection (a)(1) makes deportable any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry," and subsection (d) makes the provisions of the section applicable to "all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." Congress, in short, by these provisions, "was legislating retrospectively, as it may do" (353 U.S. at 690; 353 U.S. at 694), with respect to the deportation of aliens who were excludable by law at the time of entry, regardless of when entry occurred.[7]

2. Petitioner's contention (Pet. 37-49, 86-134) that the rule of *res judicata* foreclosed the government from showing in the deportation proceeding that he entered this country illegally in 1920, because the contrary had been established by the judgment admitting him to citizenship in 1928, is likewise without merit. The

[7] There is no conflict, as asserted by petitioner (Pet. 30, 64), between the decision below and *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578 (C.A. 2). The latter case involved the effect of the saving clause of the 1952 Act on an alien's eligibility for voluntary departure in lieu of deportation. The alien's deportability was not in issue, and no question of the preservation of a "status of nondeportability" was involved. Moreover, the case was decided before *Lehmann* v. *Carson*, 353 U.S. 685, which is squarely dispositive of petitioner's present contention.

short answer to the argument is that the judgment admitting him to citizenship was set aside in the denaturalization proceeding. A vacated judgment manifestly cannot be *res judicata* as to any issue, particularly where, as here, the judgment was revoked for fraud in its procurement. Nor did the issuance by the immigration authorities of a certificate of arrival, incident to the naturalization proceedings, bar later proof, in the deportation proceedings, that the entry had in fact been illegal (cf. Pet. 43, 44, 92, 93, 94, 99). As noted by the district court (A. 261; Pet. App. 842), a certificate of arrival merely reflects data taken from the record of the alien's entry, and in petitioner's case the record of entry—owing to his fraudulent use of a passport issued in another's name—failed to reflect the true facts. "Certainly," as the court observed, "there cannot be attributed to such a certificate a veracity which was lacking in the records on which it was based" (A. 261-262; Pet. App. 842).[*]

3. There is likewise no merit to the claim of petitioner (Pet. 49-50, 138-139) that the Special Inquiry Officer improperly placed upon him the burden of proving that his entry was lawful, rather than requiring the government to show that it was unlawful. It is apparent from the officer's detailed analysis of the government's

[*] See also the court of appeals' observation to the same effect at Pet. App. 851. *Anselmo* v. *Hardin*, 253 F. 2d 165 (C.A. 3), asserted by petitioner to be in conflict with the decision below (Pet. 30, 64-65), involved the effect as *res judicata* of a judgment favorable to an alien arising out of one deportation proceeding on a subsequent attempt to deport the alien on similar grounds. It has no relevance to the present case.

evidence in his opinion (A. 110-123) that he considered the burden of proof of the illegality of entry to rest on the government. At the hearing the Special Inquiry Officer pointed out to petitioner's counsel, correctly, that under the law the burden rests on the alien in a deportation proceeding to show "the time, place, and manner of his entry into the United States" [9] (A. 103-104). But the officer did not interpret this as placing the burden of proof of the legality of entry on petitioner. Counsel for petitioner had argued at the hearing, when his attention was called to the aforesaid provision, that "the proof of the entry" was contained in the exhibits of record and that petitioner proposed to present no further evidence (A. 104). The Special Inquiry Officer, referring in his opinion to counsel's argument, said (A. 124):

> He apparently makes this claim on the basis of the respondent's entry into the United States in August 1920 as Paolo Maglio. However, as previously discussed in detail, *the proof presented by the Government has established* that the respondent's entry on that date was unlawful and that he was excludable because he did not present a valid passport, and for the further reason that he had been convicted of a crime involving moral turpitude. [Emphasis added.]

4. Nor is there substance to the argument (cf. Pet. 50-52, 139-146) that the Special Inquiry Officer, in mak-

[9] Section 291 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1361.

ing his findings, relied upon an adverse inference from petitioner's claim at the hearing of the privilege against self-incrimination (see the Statement, *supra*, pp. 5, 11). The officer, while noting in his opinion that petitioner had invoked his Fifth Amendment privilege in declining to answer the examining officer's questions relating to the circumstances of his entry (A. 108-109, 123), stated that the finding of deportability was "based solely on the evidence of the record," and not on any inferences either from the claim of privilege or from the witness's silence (A. 124). Thus, as observed by the court below (Pet. App. 850-851), "it is apparent from the record that the Officer did not rely upon any such inference [from the claim of privilege]. He recognized the government's counter burden of showing unlawful entry and there is ample evidence that this burden was sustained."

5. There is also no merit to the contention (Pet. 56-62, 171-198) that the administrative proceeding was unfair because the Special Inquiry Officer considered evidence that was not introduced at the hearing. The "evidence" complained of consisted of English translations of the provisions of the Italian Penal Code on which petitioner's 1917 conviction of "voluntary homicide with grave provocation" was based (A. 122, 126-127, 224-225). The hearing officer consulted these provisions in order to verify that the offense was one involving moral turpitude (A. 122), as alleged in the order to show cause (A. 84-85). It was not improper for the officer to examine these provisions without requiring that they be formally received in evidence as

exhibits. The record of the conviction, which was in evidence (A. 224-225), cited the provisions (A. 225). The provisions themselves, therefore, could properly be deemed to be in evidence also by reference. The officer's examination of the provisions involved, at most, a matter of official or administrative notice. Cf. Davis, *Administrative Law* (1951), §§ 150 *et seq.* Petitioner does not contend that the provisions were inaccurately reported by the officer, nor otherwise show that he has been prejudiced. As observed by the court below (Pet. App. 849):

> It appears from the conviction record that the homicide was voluntarily committed and that a sentence was imposed. The term "voluntary" indicates an intent to kill and the fact that a sentence was imposed negates any possibility that the killing was justifiable. So long as the homicide is voluntary and not justifiable no amount of provocation can remove it from the class of crimes involving moral turpitude.

See also *Pillisz* v. *Smith*, 46 F. 2d 769, 770 (C.A. 7); *United States ex rel. Allessio* v. *Day*, 42 F. 2d 217 (C.A. 2); *United States ex rel. Soffano* v. *Doak*, 5 F. Supp. 561, 564-565 (N.D.N.Y.), affirmed, 68 F. 2d 1019 (C.A. 2). Moreover this contention goes only to the second of the two grounds of deportability—petitioner's excludability at the time of entry as a person convicted of a crime involving moral turpitude. It has no relevance to the first, and independent, ground—the entry on a false passport. Thus, in no event could the contention affect the result.

6. Simultaneously with its denial of a petition for rehearing in the present case, the court of appeals denied, without opinion, a motion by petitioner (which had been filed with and printed as part of the petition for rehearing, see Pet. App. 871) for leave to file in the district court a petition under Rule 60(b), F. R. Civ. P. (Appendix, *infra*, pp. 25-26), for relief from the judgment of denaturalization (Pet. App. 865-867, 870-871). The petition for a writ of certiorari contains a section, captioned "Motion Pursuant to Rule 60(b)" (Pet. 62-63, 198-205), relating to that motion. Treating this portion of the petition as, in effect, a petition seeking review of the denial of the motion for leave to file a Rule 60(b) petition in the denaturalization matter, we submit that it clearly presents nothing meriting further review by this Court. The evidence that petitioner procured his naturalization through willful misrepresentations and the concealment of material facts was clear, unequivocal, and convincing (cf. *Schneiderman* v. *United States*, 320 U.S. 118, 135), and no good reason was presented to the court of appeals,[10] and none is now suggested, why a proceeding under Rule 60(b) would be appropriate. Moreover, the motion was untimely.[11]

[10] See motion at Pet. App. 865-867, and government's reply at Pet. App. 868-869.

[11] The motion for leave to file a petition under Rule 60(b) was filed December 18, 1961 (Pet. App. 871), three and one-half years after the affirmance of the judgment of denaturalization by the court of appeals (*United States* v. *De Lucca*, 256 F. 2d 487 (June 18, 1958)), and more than three years after the denial of certiorari by this Court (358 U.S. 836 (October 13, 1958)). Rule 60(b) requires that motions thereunder be filed within a year of the judgment from which relief is sought in the case of some of the specified

7. Petitioner's remaining contentions, all insubstantial, require no more than brief comment:

(*a*) The argument (Pet. 52-54, 146-164) that the Special Inquiry Officer "failed to distinguish between a passport issued to petitioner [in a name which was not his true name] and one issued to another and used by petitioner" (Pet. 52, 146), in addition to being based on conjecture and speculation, is irrelevant, since in any event, as the evidence showed, petitioner gained entry on a passport which did not properly identify him.

(*b*) The assertions that the government suppressed relevant evidence within the control of its officials (Pet. 55-56, 165-171) are gratuitous and without support in the record.

(*c*) There is no conflict, as asserted (Pet. 30-31, 65-67), between the decision below and *United States* v. *Stromberg*, 227 F. 2d 903 (C.A. 5). The *Stromberg* case held that "illegal procurement" of naturalization, a ground of denaturalization under the law existing prior to the Immigration and Nationality Act of 1952, was not continued as such a ground under that Act. The holding thus has no relevance to the present case, involving a deportation proceeding.[12]

---

grounds of relief (including one on which petitioner relies), and "within a reasonable time" in all other cases.

[12] It is true that the district court in the present case expressed the view that "illegal procurement as a ground for denaturalization was saved by Section 405 (a) of the Immigration and Nationality Act of 1952" (A. 257; Pet. App. 838). However, the statement was not necessary to the decision, and indeed its pertinence to the case is not clear. The basis of petitioner's denaturalization was not "illegal procurement" but willful misrepresentation and concealment of material facts—grounds specifically made causes for denaturalization by the 1952 Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

MARCH, 1962.

APPENDIX

STATUTES, REGULATIONS AND RULE INVOLVED

1. The Immigration and Nationality Act of June 27, 1952, §§ 241(a) (1) & (d), 405(a), 66 Stat. 204, 208, 280:

GENERAL CLASSES OF DEPORTABLE ALIENS

SEC. 241 [8 U.S.C. 1251]. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * * *

SAVINGS CLAUSES

SEC. 405 [8 U.S.C. 1101, Note]: (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the

validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

* * * * * *

2. The Act of May 22, 1918 (the "Passport Act of 1918"), sec. 1, 3, 40 Stat. 559:

[Sec. 1.] When the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

* * * * * *

Sec. 3. Any person who shall willfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than twenty years, or both; * * *.

3. The Immigration Act of February 5, 1917, § 3, 39 Stat. 875 (8 U.S.C. (1926 ed.) 136):

Sec. 3. The following classes of aliens shall be excluded from admission into the United States: * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * *.

4. Executive Order No. 2932 of August 8, 1918[1]:

RULES AND REGULATIONS GOVERNING THE ISSUANCE OF PERMITS TO ENTER AND LEAVE THE UNITED STATES

Supplemental to the Presidential proclamation of August 8, 1918 [40 Stat. (Part 2) 1829], and by virtue of the authority set forth therein [the Act of May 22, 1918, *supra*, pp. 22-23], I hereby prescribe the following rules and regulations governing departure from and entry into the United States.

[1] See *Laws Applicable to Immigration and Nationality* (GPO, 1953) p. 1050 ff.

TITLE I.—DEFINITIONS

SEC. 5. The term "passport" as used herein includes any document in the nature of a passport issued by the United States or by a foreign government, which shows the identity and nationality of the individual for whose use it was issued and bears his signed and certified photograph.

* * * * * * *

TITLE 7.—PERMITS TO ENTER

SEC. 31. Subject to the exceptions and limitations hereinbefore set forth no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917. Said Joint Order and the amendments thereto and instructions issued thereunder are hereby confirmed and made part hereof by reference, so far as their provisions are not inconsistent with these rules and regulations or with the President's Proclamation of August 8, 1918. * * *

* * * * * * *

5. The Joint Order of the Department of State and the Department of Labor issued July 26, 1917 [2]:

After due publication of this order in foreign countries every person leaving a foreign country for the United States (except persons starting from Canada) with the purpose of entering, pass-

[2] See *Laws Applicable to Immigration and Nationality* (GPO, 1953), p. 1042 *ff.*

ing through or touching at a port of the United States shall be required, before he is permitted to enter the United States, to present a valid passport, or other official document in the nature of a passport, satisfactorily establishing his identity and nationality, with a signed and certified photograph of the bearer attached. * * *

* * * * * * *

6. Rule 60(b) of the Federal Rules of Civil Procedure:

RELIEF FROM JUDGMENT OR ORDER

* * * * * * *

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the

judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

U. S. GOVERNMENT PRINTING OFFICE 1961 632774 1019